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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORVILLE R. MERTZ and
McGRAW-HILL, INC.,

Petitioners,

v.

WILLIAM A. DENNY,

Respondent.

On Writ of Certiorari
to the Supreme Court of the
State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err in determining whether the plaintiff in a defamation action was a "public figure" by attempting to measure the legitimacy and extent of the public's interest in a controversy involving a publicly-traded corporation, rather than focusing on the extent of the plaintiff's voluntary involvement in the controversy?

2. Did the Wisconsin Supreme Court err in holding that the first amendment and the equal protection clause of the fourteenth amendment to the United States Constitution afford no protection for speech by a non-media defendant in a defamation case?

3. Did the Wisconsin Supreme Court's holding requiring defamation defendants, including media defendants, to bear the burden of proving truth as a defense result in an unconstitutional imposition of liability without fault?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Orville R. Mertz and McGraw-Hill, Inc.* pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Wisconsin entered in this action on March 30, 1982.

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*Pursuant to Supreme Court Rule 28.1, petitioner McGraw-Hill, Inc., provides the following list of subsidiaries (except wholly-owned subsidiaries) and affiliates: Newton Falls Paper Mill, Inc., Rock-McGraw, Inc., American Industrial Report Ltd., McGraw-Hill Ryerson Limited, Nikkei-McGraw-Hill, Inc., and Tata McGraw-Hill Publishing Company Private Limited.

OPINIONS BELOW

The decision and order of the Supreme Court of the State of Wisconsin, dated March 30, 1982, is reported at 106 Wis.2d 636, 318 N.W.2d 141 (1982), and at 8 Med. L. Rep. (BNA) 1369, and is reproduced in the appendix to this petition, *infra*, at A-1 *et seq.*

The opinion of the Court of Appeals of the State of Wisconsin is reported at 100 Wis.2d 332, 302 N.W.2d 503 (1981), and also at 7 Med. L. Rep. (BNA) 1261, and is reproduced in the appendix to this petition, *infra*, at B-1 *et seq.*

The decision and judgment of the trial court is reported at 5 Med. L. Rep. (BNA) 2509 (1980), and is reproduced in the appendix to this petition, *infra*, at C-1 *et seq.*

A previous decision of the Supreme Court of the State of Wisconsin in this case is reported at 84 Wis.2d 654, 267 N.W.2d 304 (1978), and also at 4 Med. L. Rep. (BNA) 1153, and is reproduced in the appendix to this petition, *infra*, at D-1 *et seq.*

A previous decision of the trial court in this case is reproduced in the appendix to this petition, *infra*, at E-1 *et seq.*

JURISDICTION

The opinion and order of the Supreme Court for the State of Wisconsin was entered on March 30, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). Although there are further proceedings yet to come in the state court, the federal issues in this case have been finally decided. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). If the Wisconsin Supreme Court's rulings on the federal issues involving public figure status and constitutional protection for speech are reversed, the case will be ended.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The first amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State may enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Respondent William A. Denny (hereafter "Denny") commenced this action against petitioners Orville R. Mertz (hereafter "Mertz") and McGraw-Hill, Inc. (hereafter "McGraw-Hill") in April, 1976. Denny alleged damages based upon defamation, stemming from an article which appeared in the January 19, 1976 issue of McGraw-Hill's magazine *Business Week*. The article, entitled "Top Management Ferment at Koehring" (App. at F-1), concerned shareholder unrest and the turnover of top management personnel at the Koehring Company (hereafter "Koehring"), most notably petitioner Mertz, who resigned as Chairman of the Board and Chief Executive Officer on December 5, 1975. The Koehring Company was a

publicly held corporation listed among *Fortune* magazine's top 500 corporations. The company is based in Milwaukee, Wisconsin. Denny had been employed at Koehring as senior staff attorney until 1969 when he resigned. (App. at C-1.)

During 1974 and 1975, Denny was extremely active and vocal in his opposition to the management of Koehring and led a movement to oust Mertz and change the company's directors. (Jt. App. at 159, 165, 171-73.)* At his deposition, Denny testified that, in his opinion, he did influence the results of that movement. (Jt. App. at 170-71.) Toward that end, in early 1975, Denny commenced a letter-writing campaign to Charles W. Walton, a Vice President, General Counsel and Secretary of the corporation demanding access to Koehring's corporate records in order to prepare for the annual shareholder meeting. (Jt. App. at 101.) When Denny was denied access, he commenced a civil action against Koehring and Walton in the Milwaukee County Circuit Court. Denny was successful in that action and was allowed access to the documents.

Denny precipitated inquiries to Koehring Company by the United States Securities and Exchange Commission. Denny informed the SEC that he had reviewed various materials mailed to Koehring shareholders and he felt there were misstatements and material omissions. (Jt. App. at 102-04.) In addition, Denny contacted the office of the Wisconsin Commissioner of Securities concerning the company. Denny's inquiries prompted an investigation by the State of Wisconsin.

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*Pursuant to Supreme Court Rule 19.1, petitioners have concluded that the record of this case is not essential to a proper understanding of the case and therefore have not requested that the record be certified and transmitted to this Court. Petitioners believe, however, that some citation should be provided as a basis for its statement of facts. Accordingly, petitioners have cited the joint appendix they filed with their brief in the Wisconsin Court of Appeals. Pursuant to the request of the Wisconsin Supreme Court, this brief and joint appendix were filed in the Wisconsin Supreme Court as well. The citation to "Jt. App." refers to this joint appendix. Where appropriate, of course, citations will be made to the appendix filed with this petition. These citations will be to "App."

At the March, 1975 shareholder meeting, Denny was active in his opposition to the management and existing Board of Directors. He raised many questions from the floor of the meeting, challenged the propriety of certain procedures, and generally voiced his opposition to the management of the company. In the wake of that meeting, the *Milwaukee Sentinel*, a daily newspaper, published an article concerning the shareholder meeting and specifically reported about Denny:

> Principal spokesman for the critics was Attorney William A. Denny, who headed Koehring's legal department for 14 years prior to 1969 and who was the author of the suit to open the management filed [sic] last month.
>
> Denny reportedly holds 4,400 shares of Koehring stock.

(App. at F-4, 6.) The article concluded by noting that Denny was interviewed after the meeting and stated that his group sought to review certain actions by Koehring management. As the article noted: "It is some of those moves that the dissident group seeks to review, Denny indicated later." (App. at F-7.)

In July of 1975 Denny brought a second suit against Koehring and Walton in the Milwaukee County Circuit Court. Denny again sought and received access to certain Koehring records. In addition, by letter dated November 17, 1975, Denny wrote to hundreds of large shareholders of Koehring Company. (Jt. App. 106, 161-62.) He sought to rally their support in opposition to the management of the company. On November 26, 1975, Denny again wrote the Koehring Directors, enclosing copies of some of the letters he had received in response to his letter to shareholders of November 17, 1975. He concluded the letter by asking if there was any other way he could convince a majority of the Board of Directors that it was time to change top management at the company. (Jt. App. at 107.)

In response to the controversy and opposition created by Denny, defendant Mertz resigned as Chairman of the Board and Chief Executive Officer on December 5, 1975.

Throughout the course of his activities in 1975, both Denny and the Koehring controversy were given wide coverage by the press. On February 27, 1975, *The Milwaukee Journal* reported that Denny had sued Koehring in order to inspect corporate minutes and shareholder records. (App. at F-7.) A follow-up article appeared in the *Milwaukee Sentinel* the next day, headlined "Koehring Holder Wins Plea". (App. at F-8.) On March 22, 1975, both *The Milwaukee Journal* and *Milwaukee Sentinel* reported on the Koehring shareholder meeting the day before. (App. at F-4 and 9.) Both articles made reference to Denny's activities at the meeting, *The Milwaukee Journal* article noting:

> One of the most vocal and persistent in procedural moves was William A. Denny, Elm Grove, a lawyer who headed Koehring's legal department before leaving in 1969.

(App. at F-12.) At his deposition, Denny admitted receiving calls from reporters, and also testified that he himself had made one call to a reporter of a Milwaukee paper. (Jt. App. at 163.) Denny retained a list of newspapers and their telephone numbers. (Jt. App. at 125.)

On March 28, 1975, Denny wrote a two-page letter to *The Wall Street Journal* in an attempt to increase coverage of the Koehring controversy. Denny wrote, in part:

> Here's a copy of recent articles in the Milwaukee newspapers about the March 21st Koehring Company Annual Shareholders Meeting.
>
> I was a bit surprised to see no reference of that meeting in your paper this past week.

* * *

> I fully appreciate that you must apply your own judgment as to what is newsworthy and what is not. However if you think there is anything involved here which may be of interest to your readers, I would be glad to help you get such facts as might be accessible to myself or a client of ours. I had a court reporter in attendance at the Annual Meeting. However no transcript has been prepared because a $300 estimate is a bit too large for my client's pocketbook.

(App. at G-1.) According to a file memorandum prepared by Denny on April 2, 1975, Ames Smithers, a reporter for *The Wall Street Journal*, called Denny on April 1. After noting the reporter's telephone number and address, Denny wrote:

> He expressed a keen interest in anything else that might develop with respect to Koehring Company that might be newsworthy. He asked for my promise to inform him as to anything that might be filed in Court regarding Mertz and Loewi and the Career Academy and National Tape shares.
>
> I told him I would do all that I could.

(App. at G-3.) On April 9, 1975, *The Wall Street Journal* noted that the Koehring Company had repurchased 100,000 of its shares from the retirement trust. (App. at F-14.) This was also reported in *The Milwaukee Journal* on April 8, 1975. (App. at F-13.) Denny had previously alerted *The Wall Street Journal* that this was likely to occur.

On April 28, 1975, *The Wall Street Journal* reported that Karl H. Schwamborn had been elected a director of Koehring Company. (App. at F-15 and 16.) The article began:

> Responding to pressure from dissident shareholders, directors of Koehring Corp. expanded the Board to 11 from 10 and filled the vacancy with a Koehring executive whom dissidents had tried to elect as director at the annual meeting in March.

The Milwaukee Journal and *Milwaukee Sentinel* also ran stories on Schwamborn's election (App. at F-14 and 15).

In July of 1975, *The Wall Street Journal* reported Robert Lindgren's selection as President of Koehring (App. at F-19), as did *The Milwaukee Journal* and *Milwaukee Sentinel.* (App. at F-16 and 18.) The *Milwaukee Sentinel* article mentioned the attack on Koehring management by dissident shareholders at the previous annual meeting.

Business Week became interested in the Koehring controversy on December 5, 1975, the day Mertz resigned. The resignation was reported in *The Milwaukee Journal,* the *Milwaukee Sentinel, The Wall Street Journal* (App. at F-19-23) and on the Dow Jones wire. *Business Week* Reporter David Santry testified at his deposition that he was intrigued by Mertz's statement that he was resigning in the wake of shareholder controversy. Santry thought this was of interest to the general business community. (Jt. App. at 145-46.) Santry contacted a source in Milwaukee, who told him that he should contact Denny, one of the leaders of the opposition, for more information. (Jt. App. at 147.)

Santry contacted Denny in Milwaukee. As a result of Santry's inquiry, Denny sent him approximately 188 pages of material from Denny's files. (Jt. App. at 118-22.) Included were copies of eight different newspaper articles on Koehring and Mertz, copies of pleadings relating to the two suits brought by Denny against the company, copies of items of correspondence between Denny and Walton, a copy of Denny's letter to Koehring shareholders, copies of shareholders' replies to Denny, copies of press releases, copies of Koehring's quarterly report and annual report, and a number of other materials. When Santry received the materials he became interested in the story and contacted Denny again. Denny gave Santry the names and telephone numbers of a number of other people involved in the controversy who could be contacted.

Santry called and interviewed the men identified by Denny. (Jt. App. at 149.) In at least one instance, Denny assisted Santry

in his attempt to interview one of the men, who resided in Germany. In Santry's opinion, Denny was a "great source" and had "lots of specific information." (Jt. App. at 150.) In addition, Santry noted: "He was a treasure-trove, you might say, more than willing to help." (Jt. App. at 149.)

In the course of preparing the article, Santry attempted repeatedly to contact Mertz regarding his view of the controversy. On December 30, 1975, Santry finally contacted Mertz by telephone at his home. Santry asked Mertz about events at Koehring. Concerned that Denny might not have objectively represented the facts regarding both Mertz's activities and the health of the company, Mertz telephoned Santry later that same day. (Jt. App. at 136, 142-43.) Mertz hoped to alert Santry to Denny's critical attitude toward Mertz and "to filter [Denny's] comments." (Jt. App. at 136.) In the course of the conversation, Mertz told Santry that Denny's employment with Koehring had been "terminated." (Jt. App. at 139, 154.)

Thereafter, *Business Week* published the January 19, 1976 article concerning the Koehring management controversy. The statement upon which this action is based is a single phrase appearing near the end of the article concerning Mertz and Koehring's management, mentioning that Denny had been "general counsel of Koehring until Mertz fired him in 1969 . . ." (App. at F-3.) Based on an appeal following the trial court's overruling petitioners' motions to dismiss, the Wisconsin Supreme Court in *Denny v. Mertz*, 84 Wis. 2d 654, 267 N.W.2d 304 (1978), ruled that the term "fired" might be deemed defamatory under the circumstances. The case was sent back to the trial court where discovery then proceeded.

After discovery, petitioners brought motions for summary judgment. Petitioners asserted that respondent was a public figure and that under the test of *New York Times v. Sullivan*, 376 U.S. 254 (1964), there was no evidence of actual malice and that therefore respondent could not prevail. (App. at C-7-9.) The trial court granted the motions for summary judgment. The court of appeals reversed. (App. at B-1.) Petitioners again raised the public figure issue in the State Supreme Court and

argued that a non-media defendant such as Mertz was entitled to constitutional protections for the statements made to the *Business Week* reporter. (App. at A-1, 5, 21.) The State Supreme Court *sua sponte* raised and decided the issue of who bears the burden of proof on the issue of falsity in a defamation case. (App. at A-23, n.35.)

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED BY ATTEMPTING TO MEASURE THE LEGITIMACY AND EXTENT OF THE PUBLIC'S INTEREST IN A CONTROVERSY AND BY MISAPPLYING THIS COURT'S CRITERIA TO BE USED TO DETERMINE WHETHER A DEFAMATION PLAINTIFF IS A PUBLIC FIGURE.

Petitioners argued in the court below that respondent Denny was a "limited purpose public figure" for purposes of the defamation action at issue in this case. This Court has adopted a two-part test for determining whether a defamation plaintiff is a limited purpose public figure. A court must first determine whether a public controversy existed and then must determine whether the defamation plaintiff voluntarily involved himself in efforts to influence the outcome of the controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 and 351-52 (1974). Under this test, courts are to examine the nature and extent of an individual's participation in the controversy:

> More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> • • •
>
> It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and

> extent of an individual's participation in a particular controversy giving rise to the defamation action.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 345 and 352.

In reaching its decision, the trial court below found that Denny voluntarily became involved in the controversy surrounding Koehring, that he injected himself into the controversy, that he attempted to influence the resolution of the controversy, and that he drew attention to the controversy through contacts with the press. The Wisconsin Supreme Court did not reject these findings. Instead, the Wisconsin court held that Denny was not a public figure because: (a) there was no "public controversy" surrounding the Koehring stockholder disputes; (b) by the time Denny talked to the *Business Week* reporter, Mertz had resigned and therefore the controversy had ended; (c) Denny did not have sufficient access to the media; and (d) Denny was motivated by personal financial interest rather than some general concern for corporate governance.

A. Existence of Public Controversy.

The Wisconsin court conceded that "Denny did deliberately involve himself in the Koehring dispute in order to influence the management of Koehring," but still held that Denny was not a public figure because there was no public controversy. The court stated: "[w]hile newsworthy, the Koehring stockholder disputes did not have an impact outside of those immediately interested in the Koehring Corporation." (App. at A-12.)

The Wisconsin court properly examined the extent of Denny's activities, but then attempted to quantify the public's interest in the underlying controversy. This is constitutionally impermissible. The court attempted to determine whether the Koehring controversy was relevant to the general public. It attempted not only to quantify the public's interest in the controversy but also to measure the legitimacy of that interest. This type of analysis was expressly repudiated by the Court in *Gertz* and was the reason the plurality decision in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), was rejected in *Gertz*:

> [The "public or general interest" test set forth in *Rosenbloom*] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not — to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79. We doubt the wisdom of committing this task to the conscience of judges.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 346.

Courts are not to determine what is "relevant to self-government." As pointed out by Justice Marshall in his dissent in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79 (Marshall, J., *dissenting*), "all human events" are arguably of public interest.

The Court has consistently declared that the proper focus is on the individual's actions, not the substantive nature of the controversy. In *Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976), for instance, the Court said:

> It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for focusing upon the character of the defamation plaintiff.

More recently, in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167 (1979), the Court stated:

> We emphasized [in *Gertz*] that a court must focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

In *Hutchinson v. Proxmire,* 443 U.S. 111, 135 (1979), quoting *Time, Inc. v. Firestone, supra,* at 456, the Court stated:

> The "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area."

The United States Courts of Appeals for the Fifth and Eighth Circuits recognized in recent cases that the determination of a person's status as a "public figure" must focus upon that person's actions rather than the underlying controversy. In *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981), the court said:

> To determine plaintiffs' status based on the latter formulation [prominence in the resolution of a public question], however, would require us to decide what is and is not a public question, a task the [U.S. Supreme] Court has stated is inappropriate for judges. . . . *We therefore focus instead on plaintiffs' actions in seeking publicity or voluntarily engaging in activities which necessarily involve the risk of increased exposure and injury to reputation.*

Id. at 1254 (emphasis added).

The legitimacy and extent of the public's interest should not be measured in deciding whether someone is a "public figure." The status of the person allegedly defamed is the "controlling factor." *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 584 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980).

The danger of attempting to determine the legitimacy of the public's interest was recognized in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), where the United States Court of Appeals for the District of Columbia warned:

> [A] court may not question the legitimacy of the public's concern; such an approach would turn courts

> into censors of "what information is relevant to self-government" [citations omitted]. A vital part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society's agenda. Thus, courts must look to what already were disputes.

627 F.2d at 1296-1297 (footnotes omitted).

Courts should only determine whether something was a matter of controversy before the alleged defamation. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir. 1980). In this way, courts avoid determinations of what is in the public's interest. Such an inquiry, the court in *Bruno & Stillman, Inc.* pointed out, satisfies the stricture in *Hutchinson v. Proxmire, supra,* 443 U.S. at 135, that the media may not create their own defense by making the claimant a public figure.

The facts in this case demonstrate considerable public involvement with the Koehring controversy. The editors and publishers of *The Milwaukee Journal,* the *Milwaukee Sentinel, The Wall Street Journal* and *Business Week* all recognized it as a matter worthy of the public's attention, as did the Dow Jones wire service. At least sixteen different articles appeared in the local and national press from February through December, 1975, concerning Koehring and its management controversy.

The Wisconsin Supreme Court concluded that there was no public controversy because "the Koehring stockholder disputes did not have an impact outside those immediately interested in the Koehring corporation." (App. at A-12.) As noted by the dissent in the court below, the majority opinion did not explain the phrase "immediately interested in the Koehring corporation":

> If the phrase "immediately interested in the Koehring corporation" refers to the shareholders, the majority is talking about a dispute that has an impact on approximately 11,500 people. If the phrase "immediately

> interested in the Koehring corporation" refers to suppliers to and customers, competitors and employees of the corporation, and people living in communities in which plants are located (and I think all these persons can be considered as "immediately interested in the Koehring corporation"), the majority is talking about a dispute that has an impact on many thousands of people. Koehring, a *Fortune* 500, publicly owned, publicly traded international corporation with headquarters in Milwaukee, Wisconsin, employs between 10,000 and 11,000 persons at 23 plants in the United States, Canada, Germany, France, England and Japan and has sales offices in other countries. On how many thousands must the controversy have an impact in order for the majority to consider the matter a public controversy?

(App. at A-29, Abrahamson, J., *dissenting*.)

Corporate democracy and corporate governance have long been matters of wide concern, particularly within the business community. Such concern likely exceeds the public's interest in the matters which were considered public controversies in *Fram v. Yellow Cab Co.*, 380 F.Supp. 1314 (N.D.Pa. 1974) (local taxicab rates), *Cera v. Gannett*, 365 N.Y.S.2d 99 (1975) (merits of chiropractic medicine), *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (physical condition of a professional football player), and *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 353 N.E.2d 834 (1976) (belly dancing in Rochester, New York), all actions for defamation.

Likewise, cases decided under the *Rosenbloom* test of "public or general interest" recognized the variety of subject matters which were of general interest and therefore worthy of the public's attention. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970) (public accommodation at the Masters Golf tournament); *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y.S.2d 325 (Sup. Ct. 1972) (food served at a local restaurant); and *Washington v. New York*

News, Inc., 37 App. Div.2d 557, 322 N.Y.S.2d 896 (1971) (bishop's attendance at a nightclub performance).

B. Termination of Controversy.

The Wisconsin Supreme Court also concluded that if there had been a controversy, it had ended by the time Denny talked with the *Business Week* reporter. The court relied on *Hutchinson v. Proxmire, supra*, for the proposition that a person may not be made into a public figure by the very publication which defames him.

Petitioners do not quarrel with this legal proposition. However, it is irrelevant to the facts here. At least sixteen different newspaper articles were published concerning the Koehring controversy beginning in February and carrying through December, 1975. A Dow Jones wire story ran on December 5, 1975. These all preceded the *Business Week* article. Petitioners have never contended that the *Business Week* article made Denny a public figure or initiated the public debate over Koehring's management problems.

The Wisconsin Supreme Court concluded that the controversy had ended when Denny rendered his considerable assistance to the *Business Week* reporter in preparing the article. This is incorrect. The record is clear that, while Mertz had resigned on December 5, 1975, Denny remained very active in the continuing controversy to change the board of directors at Koehring. As Denny himself said in a letter dated December 17, 1975, to Koehring stockholders:

> It now remains to be seen if the resigned chief executive officer and the directors who actively supported him will resign from the Board. If they don't, I am reasonably sure you will be hearing more on the subject of shareholders organizing for the next shareholders' meeting.

(Jt. App. at 127.) Denny obviously recognized the continuing effort to unseat directors — including Mertz — as an ongoing

controversy, and he was attempting to influence the outcome of that controversy by supplying a "treasure trove" of information to the *Business Week* reporter.

The effect of the Wisconsin Supreme Court's findings that the controversy had ended on or about December 5, 1975, and Denny was not a public figure is that Denny somehow reverted to private-figure status in a matter of days after involving himself in the controversy and with the media for almost a year. Neither the facts nor the law support this result. Furthermore, such a conclusion fails to afford "to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

C. Access to the Media.

Although seeming to recognize that access to the media, or lack thereof, is not dispositive of the public figure issue (App. at A-10, n. 17), the Wisconsin court concluded that:

> While Denny did deliberately involve himself in the Koehring dispute in order to influence the management of Koehring, his efforts to protect his investment in Koehring did not give him the media access which would justify designating him a public figure.

(App. at A-12.)

The court's factual determination that Denny did not have media access is dubious at best. Denny had significant contact with the media. He solicited media coverage of the controversy. He was interviewed and quoted by the media. His actions were reported in the media. Even if the court's factual determination regarding media access is correct, the court misreads the opinion in *Gertz*, where the Court stated:

> The first remedy of any victim of defamation is self-help — using available opportunites to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and

> public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 344 (footnote omitted).

The Wisconsin Supreme Court placed undue emphasis on the notion of media access. The Court in *Gertz* did not hold that in order to "justify" designating a person as a public figure, he *must* have access to the media. Indeed, the very remedy the Court discussed in *Gertz* — self-help — was exercised by Denny. He contacted *Business Week* after the alleged defamatory statement appeared and requested a correction. *Business Week* published a correction in its March 1, 1976 issue. (App. at A-4.)

D. Motivation for Involvement.

Finally, the Wisconsin Supreme Court decided that Denny was not a public figure because his motivation for injecting himself into the Koehring controversy was personal financial interest, rather than an interest in corporate governance. Nothing in the decisions of this Court indicates that a person's motivation for voluntarily thrusting himself into a public controversy should be considered in determining whether that person is a public figure. Indeed, it follows that if it is wrong for courts to assess the nature of public controversies, it is wrong for courts to assess the motivation for a person's involvement in those controversies. The problems of attempting to assess motivation in this context are apparent. While it may appear that a person has thrust himself into a public controversy because of some economic interest, it is also likely that that person may be motivated at least in part by the prestige or notoriety attendant to involvement in the controversy. Even if such distinctions in motivation were relevant to a determination of public figure

status, courts are ill-equipped to assess accurately the motivation for involvement in any particular public controversy.

II. THE WISCONSIN COURT'S HOLDING THAT NON-MEDIA DEFENDANTS IN DEFAMATION CASES ARE ENTITLED TO NO CONSTITUTIONAL PROTECTION FOR SPEECH CONFLICTS WITH THE FIRST AND FOURTEENTH AMENDMENTS AND THE MAJORITY OF HOLDINGS IN OTHER STATE AND FEDERAL COURTS.

The court below held that a non-media defendant, like Mertz, in a defamation case is entitled to no constitutional protection for speech. (App. at A-23.) This holding raises questions under the first and fourteenth amendments, particularly in light of the facts of this case. Mertz supplied information to the press about a public figure and a matter of public interest already under investigation by the press. The investigation was due in substantial part to the efforts of Denny. To afford the press, which publicly reported on the matter, one level of protection and its sources of information a lesser level of protection, while attempting to preserve and protect robust debate of issues of public interest, would indeed be anomalous.

The press often initiates and carries on the type of debate typically afforded protection under the first amendment. More commonly, however, the press reports such debates as carried on by individual citizens. If citizens are reluctant to talk to the press about issues of public interest, then freedom of expression, and the role of the press in the exercise of that freedom, will be chilled. Indeed, freedom of the press guarantees the individual the right to put his ideas into wider circulation than he can through private conversation. Moreover, the first amendment specifically guarantees freedom of speech. The Wisconsin court's decision to afford individual defendants less protection than media defendants elevates freedom of the press over freedom of speech.

The highest courts of Alabama, Iowa, Kansas, Maine, Maryland, Oregon, Rhode Island, South Carolina and Virginia have recognized the application of the *Times-Sullivan* rule in actions against non-media defendants. *Bryan v. Brown,* 339 So. 2d 577 (Ala. 1976), *cert. denied,* 431 U.S. 954 (1977); *Anderson v. Low Rent Housing Com'n,* 304 N.W.2d 239 (Iowa), *cert. denied* 102 S. Ct. 645 (1981); *Scarpelli v. Jones,* 229 Ka. 210, 626 P.2d 785 (1981); *Michaud v. Inhabitants of Livermore Falls,* 381 A.2d 1110 (Me. 1978); *Jacron Sales v. Sindorf,* 276 Md. 580, 350 A.2d 688 (1976); *Wheeler v. Green,* 286 Or. 99, 593 P.2d 777 (1979); *De Carvalho v. daSilva,* 414 A.2d 806 (R.I. 1980); *Scott v. McCain,* 250 S.E.2d 118 (S.C. 1978); and *Fleming v. Moore,* 275 S.E.2d 632 (Va. 1981). *See also Sewell v. Brookbank,* 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978); *Williams v. Trust Co.,* 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Martonik v. Durkan,* 23 Wash. App. 47, 596 P.2d 1054 (1979). Restatement (Second) of Torts §580A comment h (1977).

The federal circuit courts of appeals and district courts likewise have applied the *Times-Sullivan* standard in cases involving non-media defendants. *Lawrence v. Moss,* 639 F.2d 634 (10th Cir.), *cert. denied,* 451 U.S. 1031 (1981); *Avins v. White,* 627 F.2d 637 (3d Cir.), *cert. denied,* 449 U.S. 982 (1980); *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3d Cir. 1979); *Maheu v. Hughes Tool Co.,* 569 F.2d 459 (9th Cir. 1978); *Davis v. Schuchat,* 510 F.2d 731 (D.C. Cir. 1975). *See also Bussie v. Larson,* 501 F. Supp. 1107 (M.D. La. 1980); *Church of Scientology v. Cazares,* 455 F. Supp. 420 (M.D. Fla. 1978), *aff'd.,* 638 F.2d 1272 (5th Cir. 1981).

Although the Court has never decided expressly the applicability of the *Times-Sullivan* standard to non-media defendants, *see Hutchinson v. Proxmire,* 443 U.S. 111, 133-34 n.16 (1979), the Court has in effect applied the *Times-Sullivan* rule to non-media defendants in *St. Amant v. Thompson,* 390 U.S. 727 (1968) (a candidate for public office), *Henry v. Collins,* 380 U.S. 356 (1965) (individual arrested for disorderly conduct), and *Garrison v. Louisiana,* 379 U.S. 64 (1964) (a district attorney).

In *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), the court succintly stated the rationale for holding that non-media defendants are entitled to the same degree of constitutional protection as media defendants:

> Our understanding of *New York Times* and its offspring is that private persons and the press are equally protected by the requirement that false comment about public figures must be knowing or in reckless disregard of the truth in order to be actionable. It seems to us a necessary corollary that comment about public figures should be equally protected whether made in mass media or in private. This is required both by the First Amendment, which speaks equally of freedom of speech and of the press, and by common sense, for if the "press" were given more protection than "private speech", persons would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting.

Id. at 734 n.3.

The Wisconsin Supreme Court did not make clear whether its holding that non-media defendants are entitled to no constitutional protection for speech applies to cases where the plaintiff is a public figure. Even if the plaintiff is not a public figure, however, a private person should not automatically be excluded from constitutional protection for speech. This is true especially, as in the instant case, where the private person is commenting on a matter of public controversy reported widely in the press. Moreover, denying constitutional protection to non-media defendants also raises equal protection problems and difficulties in defining who are the "media." The protections of the first amendment traditionally have applied to the national publisher and the lone pamphleteer alike. As Justice Abrahamson noted in her dissent in the court below, "[a]re the publishers of handbills, labor union newspapers, local labor union newsletters, or neighborhood association newsletters media or non-media?" (App. at A-36, Abrahamson, J. *dissenting*.) In this

context, applying the constitutional protection to non-media defendants has the added advantage of simplifying the law of defamation.

III. THE WISCONSIN COURT'S HOLDING THAT DEFENDANTS BEAR THE BURDEN OF PROVING TRUTH IN DEFAMATION CASES MAY RESULT IN IMPOSITION OF LIABILITY WITHOUT FAULT.

The court below held that "if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false." (App. A-23, n.35.) In *Gertz v. Robert Welch, Inc., supra,* the Court held that states are free to adopt any rule of liability concerning private plaintiffs so long as "they do not impose liability without fault." 418 U.S. at 347. The court below not only placed the burden of proving truthfulness on a defamation defendant, but also adopted a negligence standard for defamation actions in Wisconsin. As the United States Court of Appeals for the Sixth Circuit recently stated:

> It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of the statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. The two elements of carelessness and falsity are inevitably linked, for a defendant should not be liable if it "took every possible precaution to insure the accuracy of its assertions." *Gertz, supra,* 418 U.S. at 346, 94 S.Ct. at 3010. Fault then must be held to consist of two elements: carelessness and falsity.

Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 375 (6th Cir.), *cert. granted*, 102 S.Ct. 500, *cert. dismissed*, 102 S.Ct. 984 (1981) (footnote omitted).

The *Wilson* court determined that falsity is part of the concept of fault. The court also stated that:

> [A] rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. "[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the burden of proof. Consequently, in a jury trial a judge by allocating the burden of proof decides each issue of fact which the jury is to decide." . . . When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain.

Wilson v. Scripps-Howard Broadcasting Co., supra, 642 F.2d at 375 (citation omitted).

Thus, the Wisconsin court's holding that defamation defendants must bear the burden of proving the truth of statements may lead to liability without fault in violation of this Court's holding in *Gertz v. Robert Welch, Inc.*

CONCLUSION

The Court should grant this petition for a writ of certiorari because: (1) the Wisconsin Supreme Court misapplied constitutional standards to be used to determine whether a defamation plaintiff is a public figure, and thus has afforded inadequate protection to the exercise of the first amendment rights of free

speech and press; (2) the Wisconsin court's conclusion that non-media defendants are not entitled to any constitutional protection for speech violates the first and fourteenth amendments to the Constitution of the United States and the holding conflicts with the majority of holdings in other state and federal courts; and (3) the Wisconsin court's holding that defendants bear the burden of proving truth in defamation cases may result in constitutionally impermissible imposition of liability without fault.

Respectfully submitted,

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William A. DENNY, Plaintiff-Appellant,

v.

Orville R. MERTZ and McGraw-Hill, Inc.,
Defendants-Respondents-Petitioners.

Supreme Court

No. 80-436. Argued November 3, 1981.—Decided March 30, 1982.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

DAY, J. This is a review of a decision of the court of appeals published at 100 Wis. 2d 332, 302 N.W.2d 503 (Ct. App. 1981), reversing a decision of the circuit court for Waukesha county, Hon. John P. Buckley, Judge. The principal issue in this case is whether plaintiff-appellant, William A. Denny, a dissident stockholder of a publicly held corporation actively seeking ouster of the management of the corporation is a "public figure" for the purpose of maintaining an action for libel. We conclude under the facts of this case that he is not.

The second issue is: What are the constitutional protections afforded McGraw-Hill, Inc., the publisher of *Business Week* magazine, that published the libel. We conclude that, under the holding of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), Mr. Denny must prove that McGraw-Hill was negligent in publishing the libel in order to recover actual damages. "Presumed" or punitive damages may only be awarded upon proof that McGraw-Hill acted with "actual malice."

The third question is: Does the defendant, Orville R. Mertz, as the alleged source of the defamation published by McGraw-Hill, enjoy the same constitutional protections as the media publisher. We conclude he does not.

Other issues raised will be discussed in the balance of this opinion.

This is the second time this dispute has been before this court. In the earlier decision,[1] this court held that

[1] *Denny v. Mertz*, 84 Wis. 2d 654, 267 N.W.2d 304 (1978).

Denny's complaint, which alleged that Mertz and McGraw-Hill defamed him in causing to be published a statement that Denny had been "fired" from an earlier job, was sufficient to maintain a cause of action for libel.

The matter is again before us on review.

Summary judgment was granted defendants by the trial court on remand following this court's prior decision. A summary judgment is appropriate if there is no disputed issue of material fact, so that the action may be disposed of as a matter of law.[2] The facts in the case are as follows:

Mr. Denny was employed by Koehring Company (Koehring), a large Milwaukee corporation, as an attorney from 1964 to June, 1969, when he resigned to go into the private practice of law. During all times pertinent to this action Denny and his family owned about 4,400 shares of Koehring stock. Between 1969 and 1974, the price of Koehring stock dropped from forty-five dollars to five dollars per share, and the Denny family's annual dividend on this stock dropped from $8,000 to nothing. Denny claimed that this drop was due to poor management and, in 1974 and 1975, he became involved in a campaign by dissident stockholders to change the Koehring management.

Their efforts focused on ousting Mr. Mertz, chairman of the board and chief executive officer. He had been employed by Koehring in various executive capacities since 1953. In 1974, he became chairman of the board and chief executive officer. He resigned from these positions on December 5, 1975. In furtherance of these efforts, Denny commenced two lawsuits to get access to Koehring records. He requested both the United States Securities and Exchange Commission and the Wisconsin Commissioner of Securities to investigate what he alleged to be improper transactions of stock engaged in

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[2] *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980).

by Koehring and misstatements and omissions in materials mailed to Koehring shareholders.

The Koehring shareholder dispute was reported in the financial pages of the Milwaukee newspapers and in *The Wall Street Journal*. Denny was mentioned in some of the Milwaukee articles. He also wrote a letter to *The Wall Street Journal* suggesting that it might be interested in reporting on the Koehring dispute. The letter was never published, nor was Denny mentioned in any *Wall Street Journal* article concerning Koehring.

Business Week became interested in the Koehring controversy on December 5, 1975, when a reporter of that magazine, David Santry, read a news release announcing Mertz's resignation in which Mertz stated that relieving Koehring from shareholder controversies was an important reason for his resignation. Mr. Santry thought that the Koehring dispute would interest the general "business community" because, "it's not often that dissident shareholders can (depose) an incumbent manager."

In researching the story, Santry contacted Denny, who provided the reporter with documents from his files and put Santry in touch with other persons involved in the dispute. Santry also contacted Mertz who informed him that Denny was a biased source and that Denny's employment with Koehring had been "terminated."[3]

Santry's article, entitled "Top Management Ferment At Koehring," appeared in the January 19, 1976, issue of *Business Week*, (a McGraw-Hill publication). In the course of chronicling the attempts by dissident stockholders to remove Mertz, the article stated:

"Also about that time, William Denny, general counsel of Koehring until Mertz fired him in 1969, began to question many of Koehring's management decisions."

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[3] The testimony is conflicting as to the exact language which Mertz used. Mertz testified in a deposition that he told Santry that "[Denny's] services were really terminated." Santry testified that Mertz stated: "[W]e terminated him."

Following publication of the article, both Denny and Mertz contacted *Business Week*, informing the magazine that Denny had resigned rather than been fired. *Business Week* published a correction in its March 1, 1976, issue, which read:

"A Correction
"In 'Top Management ferment at Koehring' (Management, Jan. 19), BUSINESS WEEK reported that in 1969 Orville R. Mertz, then president of Koehring Co., fired William Denny, who was serving as head of the company's legal department. BUSINESS WEEK'S source for that statement has now reconsidered the circumstances surrounding Denny's departure from Koehring, and has concluded that he erred. Denny resigned. He was not fired."

Denny sued Mertz and McGraw-Hill for defamation. McGraw-Hill and Mertz moved to dismiss the action for failure to state a claim. The motion was denied by the trial court. On appeal this court affirmed the trial court.[4] After remand to the trial court and following discovery, Mertz and McGraw-Hill moved for summary judgment. The trial court granted the motion on the ground that Denny was a "public figure" who had to prove actual malice in order to prevail, and that affidavits, depositions and interrogatories submitted by Mertz and McGraw-Hill established a *prima facie* defense to the action which the affidavits submitted by Denny failed to contradict.

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[4] The issue in the earlier appeal was whether the statement that Denny was "fired" was non-defamatory as a matter of law. This Court held that the statement could be the basis for a libel action, stating:

"Both the statement that plaintiff was fired and the article as a whole could be understood by reasonable people in a defamatory sense. Reasonable people could conclude that a person's being fired would tend to injure their reputation in the popular sense or to diminish the respect or esteem that people have for him. Whether the article would actually have that effect is a question for the jury. We only hold that this complaint is not legally insufficient to state a claim." *Denny*, 84 Wis. 2d at 662.

The court of appeals reversed the trial court in a decision dated January 15, 1981, which held that Denny was not a public figure, and remanded the case to the trial court for a trial on the merits under Wisconsin libel law. This court granted Mertz's and McGraw-Hill's petition for review.

Generally, a defamatory statement is one that "tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[5] Such statement is actionable without specific proof of actual pecuniary damages.[6] However, truth is an absolute defense.[7] Certain defamatory statements may be privileged, either because of the relationship between the defamer and the defamed or because of the context in which the statement was made.[8]

I.

The first question is: Was Denny a "public figure." In *New York Times Co. v. Sullivan*, 376 US 254 (1964), the United States Supreme Court added a constitutional element to the law of defamation. *New York Times* held that a "public official" could only recover damages for a "defamatory statement concerning his official conduct" if he could prove that the statement was made with "actual malice," that is "knowledge that it was false or with reckless disregard of whether it was false or not."[9]

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[5] *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 6, 259 N.W.2d 691 (1977), quoting from the Restatement (2d) of *Torts*, p. 140, sec. 559.

[6] *Lawrence v. Jewell Companies, Inc.*, 53 Wis. 2d 656, 660–661, 193 N.W.2d 695 (1972).

[7] *Schaefer v. State Bar*, 77 Wis. 2d 120, 125, 252 N.W.2d 343 (1977).

[8] For a list and discussion of the types of privilege which provide a defense to a defamation action, *see generally*, 3 Restatement (2d) *Torts*, secs. 583–613 (1977).

[9] *New York Times*, 376 U.S. at 279–280.

The "constitutional privilege" articulated in the *New York Times* was expanded to cover a wider range of potential defamation plaintiffs and defendants.[10] In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the United States Supreme Court brought "public figures" as well as "public officials" within the ambit of the *New York Times* privilege. This process reached its peak in *Rosenbloom v. Metromedia, Inc.*, 403 US 29 (1971). Five separate opinions were delivered by the eight justices who took part in *Rosenbloom*. The plurality opinion by Justice Brennan, which was joined by only two other justices, has been treated by this court as the decision of the case.[11] *Rosenbloom* held that the "knowing falsity or reckless disregard of the truth" standard applied to all "communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[12]

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[10] The first amendment defense to a libel action first articulated in *New York Times* has been referred to as a "constitutional privilege" by courts and commentators, *see, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 501, 228 N.W.2d 737 (1975); J. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1375 (1975). "Constitutional privilege" is treated differently than ordinary privilege since privilege must generally be pleaded and proved by the defendant, *see*, Restatement (2d) *Torts*, sec. 10, comment *e*, sec. 613, comment *i*, whereas a plaintiff in a defamation action affected by the "constitutional privilege" must plead and prove facts sufficient to meet the applicable standard. *See*, Restatement (2d) *Torts*, sec. 580 A, comments *e* and *f*; L. Eldredge, *The Law of Defamation*, sec. 53 p. 293 (1978).

United States Supreme Court decisions in this area include: *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971).

[11] *Polzin v. Helmbrecht*, 54 Wis. 2d 578, 586, 196 N.W.2d 685 (1972). *See e.g., Eaton, supra*, 61 Va. L. Rev. at 1394–1398.

[12] *Rosenbloom*, 403 U.S. at 43–44.

The "matter of public concern" test for application of the constitutional privilege has never been subscribed to by a majority of the United States Supreme Court and the concept was criticized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).[12]

In *Gertz*, the court held that an attorney representing relatives of a youth murdered by a Chicago policeman in civil proceedings against the policeman was not a public figure and therefore need not surmount the *New York Times* privilege in a libel action against a magazine which allegedly defamed him. The court held that the interests of a person in recovering damages for injury to reputation must be balanced against the encouragement of exercise of first amendment rights, and that the *New York Times* standard did not adequately take this reputation interest into account when a private individual was defamed. The court also held that states could set their own standard of liability in these cases if liability without fault was not imposed. 418 U.S. at 347.

The court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.

Two types of public figures were referred to in *Gertz*. The first type is the person who has such a persuasive fame or notoriety that he may be deemed a public figure for all purposes. The second, and more common type, is one who, by being drawn or injecting himself into a public controversy, becomes a public figure for a limited range of issues. A person may become a "public figure for a limited range of issues" by his efforts to engage

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[12] For a comprehensive discussion of the impact of *Gertz* upon the law of libel and slander, see *Eaton*, 61 Va. L. Rev. 1349.

public attention so as to influence the outcome of a controversy or by "thrusting himself into the vortex of a public issue." 418 U.S. at 351–352.

Subsequent cases have applied *Gertz* in a variety of contexts. These cases have elaborated on the criteria articulated in *Gertz* for determining limited public figure status, the existence of a public controversy, and the voluntary involvement of the defamation plaintiff in efforts to influence the outcome of such controversy. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the socialite wife of a member of a prominent family brought a defamation action because of an erroneous report in *Time* magazine that her husband had obtained a divorce from her on grounds of "extreme cruelty and adultery." The court held that she need not meet the *New York Times* standard to prevail since, despite the public interest in the proceedings and outcome of the divorce case, it did not amount to a "public controversy" within the meaning of *Gertz*.[14]

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[14] "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Firestone*, 424 U.S. at 454.

Subsequently, in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167–168 (1979), the court commented:

"[A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*."

See, also, Hanish v. Westinghouse Broadcasting Company, 487 F. Supp. 397 (E.D. Pa. 1980) (fact that plaintiff attracted press attention in connection with his fundraising activities for charity cannot be equated with the existence of a public controversy).

In *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), the District of Columbia Court of Appeals drew on previous supreme court decisions to establish a test of whether a public controversy exists:

". . . [T]he judge must examine whether persons actually were discussing some specific question . . . If the issue was being de-

The supreme court further delineated the contours of a "public controversy" in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Professor Ronald Hutchinson was engaged in scientific research partially funded by federal agencies. United States Senator William Proxmire awarded a "Golden Fleece of the Month Award" to federal agencies funding Hutchinson's research on aggression in animals, citing the funding as an example of wasteful government spending. Hutchinson sued Senator Proxmire for alleged defamatory remarks that he made in connection with announcing the award.

The court found no public controversy antedating announcement of the award. Any controversy arising subsequent to the award could not transform the plaintiff into public figure status.

"To the extent the subject of his published writing became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense, by making the claimant a public figure." *Hutchinson*, 433 U.S. at 135.[18]

In *Firestone*, 420 U.S. 448, the court determined that the defamation plaintiff had not voluntarily injected

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bated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy." 627 F.2d at 1297.

See also, *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978) (development of shopping mall of interest to community); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) (cab fare controversy of public concern to city residents); *Ratner v. Young*, 465 F. Supp. 386 (V.I. 1979) (murder trial with racial overtones of concern to those who lived on or owned property in vacation islands).

[18] *See also*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (public consumer complaints regarding plaintiff's product which post-dated alleged defamatory articles could not transform plaintiff into public figure status).

herself into a public discussion of issues in an effort to influence their resolution:

"Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[16]

The court rejected the contention that Mrs. Firestone's contacts with the media converted her into a public figure. She granted press conferences "in an attempt to satisfy inquiring reporters," rather than to thrust herself to the forefront of some public controversy.[17]

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[16] *Firestone*, 424 U.S. at 454. *See also*, *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980) (a lawyer involuntarily drawn into a forum to protect his interests, was not a public figure); *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840 (Ark. 1980) (activities in complying with requirements for taking bar exam were not voluntary activities within *Gertz* "public figure" test). *Compare*, *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978) (attorney appointed to handle criminal appeal was not a public figure), and *Ratner*, 465 F. Supp. 386 (attorney volunteering to represent criminal defendants for no fee was a public figure).

[17] *Firestone*, 424 U.S. at 454–455, n. 3.

Access to the media, although often an accouterment of public figure status and part of the rationale for distinguishing a public figure from the more vulnerable private individual who generally lacks access, is certainly not determinative of public figure status. *See*, *Wolston*, 443 U.S. at 164. *See also*, *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D. N.Y. 1977) (Insurance company making $50 million public stock offering held a limited public figure for purposes of discussion of the offering, although federal securities law prohibited access to media during the period of registration.)

However, active pursuit of media coverage is an important criterion of voluntary involvement in a public controversy in an effort to affect its resolution. *See*, *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2nd Cir. 1980) (plaintiff became public figure because he actively sought publicity in effort to prevent fluoridation of water supplies); *Orr*, 586 F.2d at 1108 (attorney

In *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), the court also considered the nature of voluntary acts sufficient to warrant "public figure" status. In 1958, plaintiff Wolston refused to obey a subpoena to appear before a grand jury investigating Soviet espionage, citing ill-health. He subsequently pled guilty to criminal contempt for his failure to appear. Wolston later brought a defamation action against the publishers of a 1974 book which named Wolston as a Soviet agent.

The court acknowledged that Wolston voluntarily chose not to appear before the grand jury and that publicity regarding his refusal was foreseeable. But, since he had been subpoenaed, he would have been drawn into any public controversy surrounding the grand jury investigation regardless of his actions. Since Wolston had not voluntarily undertaken to involve himself in a public controversy so as to influence its resolution, he was not a public figure required to meet the *New York Times* standard in an action for defamation arising out of a communication pertaining to the Soviet spy allegations.[18]

[1]

Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public figure. First, there must be a public controversy. While courts are not well-equipped

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sought publicity for shopping mall proposal in connection with which newspaper articles appeared after his indictment for fraud); *Di Leo v. Koltnow*, 615 P.2d 318 (Col. 1980) (former police officer actively sought publicity regarding his efforts to be reinstated).

[18] *Wolston*, 443 U.S. at 167–168. *See also, Schultz v. Reader's Digest Assn.*, 468 F. Supp. 551 (E.D. Mich. 1979) (fame due primarily to passive connection to investigations of alleged connections to underworld figures not voluntary involvement in public controversy); *Lake Havasu Estates, Inc. v. Reader's Digest Assn., Inc.*, 441 F. Supp. 489 (S.D. N.Y. 1977) (plaintiff company did not voluntarily involve itself in land fraud controversy).

to make this determination as pointed out in *Gertz*,[18] the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz*, 418 U.S. at 344–345.

[2]

Applying these standards, we hold that Denny is not a public figure for the purpose of maintaining this action. While newsworthy, the Koehring stockholder disputes did not have an impact outside of those immediately interested in the Koehring corporation. Defendants assert that the Koehring dispute raised the larger issue of corporate governance and thus made it a public controversy. However, the record is clear that Denny's attempts to change Koehring management were motivated by his desire to protect his substantial investment in Koehring stock, rather than to affect the way that corporations are governed.

[3]

While Denny did deliberately involve himself in the Koehring dispute in order to influence the management of Koehring, his efforts to protect his investment in Koehring did not give him the media access which would justify designating him a public figure. Furthermore, those actions did not invite the increased risk of publica-

[18] *Gertz*, 418 U.S. at 346. *See also*, *Waldbaum*, 627 F.2d at 1296–1297.

tion of defamatory falsehoods about him. By the time Santry talked to him about the Koehring dispute, Mertz had resigned and the controversy in which Denny was involved had ended. Denny was therefore not attempting to influence a public controversy by his actions relating to the *Business Week* article, and his contacts with Santry relating to the article may not transform him into public figure status. For, as the United States Supreme Court held in *Hutchinson*, a person may not be made into a public figure by the very publication which defames him, 443 U.S. at 135.

II.

[4]

The second issue is: What constitutional protections are afforded the news media (publication or broadcasting) in defamation actions brought by private individuals. *Gertz* stated that while the *New York Times* "knowing or reckless falsehood" standard applied to actions brought by public officials or public figures, each state was free to set its own standards for actions brought by private individuals against the news media, so long as liability without fault was not imposed. *Gertz*, 418 U.S. at 342–343, 347.

The majority of jurisdictions which have responded to the United States Supreme Court's invitation in *Gertz* to set standards for defamation actions brought against the news media by private individuals have held that such plaintiffs must prove that defendants were negligent in order to prevail.[20] Three states have retained

[20] *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216, 1222 (1977); *Dodrill*, 590 S.W.2d at 844; *Phillips v. The Evening Star Newspaper*, 424 A.2d 78, 86–87, (D.C. Ct. App. 1980); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356, 1366 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292, 296–299 (1975); *Gobin v. Globe Publishing Co.*, 216

the *Rosenbloom* standard requiring private individuals to prove knowing or reckless falsehood if the defamation involved a matter of public concern.[21] New York has adopted a gross negligence standard.[22]

The decisions which have imposed a negligence standard have based such decision on a perception that was the standard favored by the *Gertz* opinion,[23] and because a negligence standard was most compatible with the common law of the state and public policy considera-

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Kan. 223, 581 P.2d 76, 83–84 (1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 697–698 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 168–169 (1975); *Maloney & Sons, Inc. v. E.W. Scripps Co.*, 430 Ohio App. 105, 334 N.E.2d 494, 498 (1974); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 417–418 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819–820 (Tx. 1976); *Seegmiller v. K.S.L., Inc.*, 626 P.2d 968 (Utah 1981); *Taskett v. King Broadcasting Co.*, 87 Wash. 2d 439, 546 P.2d 81, 85 (1976).

[21] *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 457 (1980); *A.A.F.C.O. Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580, 586 (1974); *Peisner*, 266 N.W.2d at 697–698.

[22] *Chapadeau v. Utica Observer Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569 (1975).

[23] *E.g.*, the following language from *Jacron Sales Co.*, 350 A.2d at 696–697:

"While holding that 'so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability,' the *Gertz* Court left little doubt of its assumption that most states would adopt a negligence standard. At one point, the Court stated: 'Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a *reasonably prudent* editor or broadcaster of its defamatory potential . . . .' In prohibiting punitive damages, the Court stated that such 'damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.' Justice Blackman, concurring, flatly states that 'the Court now conditions a libel action

tions.[24] Justice Schaefer of the Illinois Supreme Court persuasively stated the arguments for a negligence standard in *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292, 296–299 (1975).

"The defendant concedes that the Federal Constitution does not require Illinois to apply the *New York Times* standard. Nevertheless the defendant urges that we should now adopt that standard as a matter of State policy. The arguments in support of that position lean heavily on the adverse effect on freedom of the press which would supposedly follow in the absence of the actual malice standard. But the extent to which liability for defamation adversely affects freedom of speech and press is a Federal constitutional question, and it has been authoritatively determined by the Supreme Court that a standard of liability less rigorous than that of actual malice will not impermissibly abridge that freedom. In deciding what standard of liability shall now apply to defamatory publications, our function is not to make an independent reappraisal of the requirements of the first amendment, but rather to ascertain whether there is any basis in Illinois law which would prevent the application here of the general principle that person is responsible for damage that he intentionally or negligently inflicts upon another.

"The adoption of a requirement of actual malice cannot, of course, be justified on the theory that such a requirement furthers some overriding public policy of this State, for prior to *New York Times* it was not considered that liability for defamation required any showing of fault at all, let alone proof of actual malice. . . .

"It is suggested that, in lieu of ordinary negligence, liability should be limited to instances of either gross

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by a private person upon a showing of negligence. . . .,' and Chief Justice Burger characterizes the majority opinion as introducing to defamation law the concept of 'negligence,' Justice Brennan refers to a reasonable care standard, and Justice White's dissent contains similar language." (citations omitted).

[24] *See* e.g., *Phillips*, 424 A.2d at 86–90; *Troman*, 340 N.E.2d at 297–299; *Gobin*, 531 P.2d at 83–84; *Martin*, 549 P.2d at 92; *Memphis Publishing Co.*, 569 S.W.2d at 418–419; *Taskett*, 546 P.2d at 84–86.

negligence or willful and wanton misconduct. We do not believe that this limitation is either necessary or appropriate. The law of defamation is already complex and multifaceted, and it would not profit by the introduction of a distinction based upon differing degrees of fault.

"Our adoption of negligence rather than actual malice as a standard is in accord with several decisions in other States which were rendered since *Gertz*. As the court said in *Gobin, supra*, 531 P.2d at 83.

"[P]ersons are generally held accountable for their negligence—the lack of ordinary care either in the doing of an act or in the failure to do something. The whole theory of negligence presupposes some uniform standard of behavior for the protection of others from harm. The norm usually is the conduct of the reasonably careful person under the circumstances."

We agree with the reasoning in the *Troman* case.

Jurisdictions which have retained the *New York Times* standard for actions by private individuals defamed by a media communication involving a matter of public interest have done so out of a belief that a negligence standard would have a "chilling effect on the news media"[28] and because of a perception that their state constitution requires this additional protection of free speech and a free press.[29]

[5]

Reviewing Wisconsin law, we conclude that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. Article I, sec. 3 of the Wisconsin Constitution, which protects freedom of speech, expressly recognizes an action for libel, providing, however, that truth shall be a defense to any criminal action:

"Free speech; libel. SECTION 3. Every person may freely speak, write and publish his sentiments on all

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[28] *Walker*, 538 P.2d at 458; *A.A.F.C.O. Heating*, 321 N.E.2d at 588.

[29] *A.A.F.C.O. Heating*, 321 N.E.2d at 586. *Reisner*, 260 N.W.2d at 697–698.

subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

That freedom of speech is subject to some limitations was set forth by this court in *Hotel & R.E.I. Alliance v. Wis. E.R. Board*, 236 Wis. 329, 341, 294 N.W. 632 (1941):

"The right to speak freely is guaranteed by the constitution, but that right, the same as other rights guaranteed by the constitution, is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, or fraud, although speech was the agency in each case."

[6]

Furthermore, this court has recognized that freedom of the press is not an absolute, but may be limited to protect the valid reputation interests of members of society. This court, in *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948), held that a statute forbidding publication of the identity of a sexual assault victim did not unconstitutionally abridge the freedom of the press, stating:[27]

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[27] The statute, sec. 348.412, Stats. 1945, read:

"Any person who shall publish or cause to be published in any newspaper, magazine, periodical or circular, except as the same may be necessary in the institution of prosecution of any civil or criminal court proceeding, or in the compilation of the records pertaining thereto, the identity of a female who may have been raped or subjected to any similar criminal assault, shall be punished by imprisonment in the county jail for not more than one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

In *Cox Broadcasting Corp. v. Cox*, 420 U.S. 469 (1975), the United States Supreme Court held that a Georgia statute similar

"As has already been stated, this statute is intended to protect the victim from embarrassment and offensive publicity which no doubt have a strong tendency to affect her future standing in society. . . . .

"When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases are weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by sec. 348.412, Stats., is fully justified." *Evjue*, 253 Wis. at 161–162.

[7]

We conclude that a negligence standard complies with the guarantee of freedom of the press contained in the Wisconsin Constitution.

[8, 9]

The general rule in Wisconsin is that a person has an obligation to exercise reasonable care so as to not cause foreseeable harm to another.[28] Once it has been established that a person has harmed another through his negligence, liability will follow unless the court deter-

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to sec. 348.412, Stats. 1945, unconstitutionally abridged the freedom of the press. *Cox* reenforces the point that the Wisconsin Constitution does not provide for broader free press rights than does the United States Constitution.

[28] In *A.E. Investment Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479, 483–484, 214 N.W.2d 764 (1974), this court stated:

"The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.

"A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable. Once negligence is established, the defendant is liable for unforeseeable consequences as well as foreseeable ones. In addition, he is liable to unforeseeable plaintiffs."

See also, Schilling v. Stockel, 26 Wis. 2d 525, 532, 133 N.W.2d 335 (1965).

mines that public policy considerations preclude holding the negligent actor liable.[29]

[10]

We conclude that the public policy balance favors the application of a negligence standard in defamation actions by private individuals against the news media. While malice is an element of actionable libel in Wisconsin, our court has implied the existence of such malice from the libelous publication itself[30] in holding persons involved in the publication of the libel liable.[31] The limited extent to which the law will protect a defamatory statement, and the reasons underlying the concern for aiding a defamed individual in obtaining redress for damage to reputation were set forth in *Williams v. Hicks Printing Co.*, 159 Wis. 90, 101, 150 N.W. 183 (1914), in which this Court discussed the concept of malice insofar as it related to an action for libel.

"One need not go further on the subject of malice in proving a charge of libel than to prove the publication, unless the situation is such as to fall within the field of conditional privilege, and then malice in law is circumstantially rebutted and malice in fact, or express malice, as it is otherwise called, is required.

"So it is not to be thought that mere good faith, honest belief in the correctness of the publication, or good motives, or accident or inadvertence, is, of itself, a defense, or even sufficient to mitigate as to actual damages, because such faith, belief, and motive are not inconsistent with malice in law arising, as a legal result, from the

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[29] "The determination to not impose liability in instances where a negligent act has been committed and the act is a 'substantial factor' in causing the injury rests upon considerations of public policy." *Hartridge v. State Farm Mut. Auto Ins. Co.*, 86 Wis. 2d 1, 11, 271 N.W.2d 598 (1978).

[30] *Polzin*, 54 Wis. 2d at 578–579; *Flynn v. Western Union Tel. Co.*, 199 Wis. 124, 127, 225 N.W. 742 (1929).

[31] *See, Pfister v. The Sentinel Co.*, 108 Wis. 572, 580–583, 84 N.W. 887 (1901); *Smith v. Utley*, 92 Wis. 133, 137–138, 65 N.W. 744 (1896).

perpetration of the act of publishing an article, the natural tendency of which is to make its victim appear ridiculous or contemptible, or a subject of hatred, or to disgrace him in society or injure him in his business."

The common law of defamation in Wisconsin does not require that any degree of culpability greater than negligence be proven in actions for defamation against the media by a "private individual."

A person's reputation and good name is of inestimable value to him and once it has been besmirched by another through carelessness or malice restoration is virtually impossible.[22] Protection of a citizen's good name is a proper concern of the state.

The duty to exercise reasonable care so as not to harm another, which pervades the law of torts, applies to the media and is appropriate in light of the substantial and legally protected interest of private individuals in maintaining their good name.[23] This standard strikes an appropriate balance between that interest and society's interest in free communication of ideas which is protected by the first amendment to the United States Constitution and Article I, sec. 3, of the Wisconsin Constitution.

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[22] *Compare, Maynard*, 98 Wis.2d at 564–566, which held that in light of *Gertz*, Wisconsin law did not support a libel action against a contract printer unless the printer knew or had reason to know of the alleged libel.

[23] "A good name is to be chosen rather than great riches." Proverbs XXII, 1. (R.S.V.)

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; tis something or nothing;
'Twas mine, tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed." Shakespeare, *Othello*, Act. III, sc. 3, line 155.

[11, 12]

Because of our holding that the *Gertz* standards apply to McGraw-Hill, Denny is not entitled to punitive or presumed damages from McGraw-Hill unless he can prove actual malice. Without proof of such malice, Denny can only recover the actual damages which he can show that he suffered due to the *Business Week* article. Such actual damages are not limited to out-of-pocket loss. In *Gertz*, 418 U.S. at 349–350, the United States Supreme Court stated:

"It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Items of damage recoverable in libel and slander actions in Wisconsin are set forth in Wis. J I—Civil 2516 (1974).[34]

III.

The third question is: Does the defendant Mertz enjoy the same constitutional protection as the media publisher.

We requested the parties to brief this specific question following filing of their original briefs.

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[34] The provisions of sec. 895.05, Stats. 1979–1980, pertaining to damages in libel actions, may also affect the actual damage award.

We find no case directly in point on this issue and it appears to be a case of first impression before this court.

The supreme court has not ruled as to whether the standards governing defamation actions set forth in *Gertz* apply to all defendants, or just media defendants. In *Calero*, 68 Wis. 2d at 501–507, this court held that the constitutional restrictions on the common law of defamation set forth in *Gertz* and its predecessors did not apply to a purely private communication between individuals. However, in *Polsin*, 54 Wis. 2d at 586, this court held that critics of the media were entitled to the same level of protection against actions for defamation as was the media, despite the fact that the allegedly libelous statement at issue was contained in a letter from a private individual which was never published. However, that is not an issue in this case.

We view the Mertz communication to Santry as coming within the standards applicable to private defamation actions.

It would be poor public policy to hold that a defendant defaming a private individual to non-media persons has no constitutional protection but if he disseminates his defamation to the media, then it is protected. A defamation that is published or broadcast gets infinitely greater circulation and can do the defamed person much greater harm. That such a defamer can then wrap himself in the constitution and acquire greater protection because he has done more harm is not the law of Wisconsin.

[13]

While we recognize that some courts in other jurisdictions have held that the *Gertz* protections apply to all defamations, regardless of whether published through the media or by private persons,[38] we do not read *Gertz*

[38] This position is persuasively articulated in *Jacron Sales Co., Inc. v. Findorf*, 350 A.2d 688. *But see, e.g., Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977).

as requiring that the protections provided therein apply to non-media defendants nor, as stated above, do we consider it good public policy to so decide.[26] We reaffirm our holding in *Calero* that purely private defamations are not entitled to constitutional protection for, as stated by Mr. Justice Goldberg in his concurring opinion in *New York Times*, 376 U.S. at 301–02, quoted with approval by this court in *Calero*, 68 Wis. 2d at 505:

"Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."

We therefore hold that Mertz's statement to Santry is entitled to no constitutional protection and that his liability for the statement, if any, should be determined according to the common law of defamation in this state.

Mertz raises additional grounds for dismissing him from the action. First, when this case was before this court on defendants' motions to dismiss, this court held that the statement in the *Business Week* article that Denny had been "fired" was actionable. *Denny*, 84 Wis. 2d at 655, 662. Discovery has revealed, however, that

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The decision in *Jacron* also stated that "truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff." 350 A.2d at 698. We strongly disagree with this allocation of the burden of proving the truth of a statement and reaffirm the law of this state that if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false. *See, e.g., Schaefer*, 77 Wis. 2d at 125.

[26] In holding that the *Gertz* protections do not apply to non-media defamation defendants, we decline to follow the suggestion in sec. 580B Restatement (2d) of *Torts*, comment *e*, that the *Gertz* protections are not restricted to the media, but should apply to all defamation defendants.

Mertz used the word "terminated" rather than "fired" in his conversation with Santry.[37]

Mertz argues that his statement that Denny was "terminated" was not defamatory as a matter of law because it could not harm Denny's reputation or lower him in the esteem of the community. He also argues that the statement was substantially true, which is an absolute defense to a libel action. *Schaefer*, 77 Wis. 2d at 123. In support of this, he cites the dictionary definition of "terminate": "To bring to an ending or cessation in time, sequence, or continuity; . . . to end formally and definitely"[38] and two cases from other jurisdictions which held that a statement that an employe was "terminated" was not libelous as a matter of law.[39]

[14]

We hold that whether Mertz's statement was defamatory is a matter for the jury. The statement must be interpreted in light of the overall context in which it was made. *Denny*, 84 Wis. 2d at 659. Santry understood Mertz to mean "terminated for cause" or fired. That others at *Business Week* equated "terminated" with "fired" is indicated by the following statement contained in a letter from the editor in chief of *Business Week* to Denny following the publication of the allegedly defamatory article:

"The reporter who worked on the story 'Top Management Ferment at Koehring' in the January 19, 1976 issue of BUSINESS WEEK came away from his interviews with the previous management with the clear impression *that you had been terminated from Koehring, rather than having resigned.*" (Emphasis added.)

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[37] *See* n. 3, *supra*.

[38] *Webster's Third New International Dictionary*, (unab. 1961) at 2359.

[39] *Demmel v. Triumph of Europe, Inc.*, 208 N.Y.S.2d 463 (1960); *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956).

We accordingly hold that Mertz's statement could have been understood by reasonable people in the community in a defamatory sense, and, insofar as it conveyed the impression that Denny had been fired, was not true.

[15]

Mertz also argues that, if he uttered a defamatory statement, it was reasonably necessary to protect his own reputation. He sought to inform Santry that Denny had reason to present a biased account of events and that Santry should appropriately discount Denny's statements in preparing his article. Thus, Mertz maintains, his statement was cloaked in a common law conditional privilege because it was reasonably necessary to protect his own reputation against the damaging version of events likely to be reported in the *Business Week* article. This privilege, which is set forth in Restatement (2d) *Torts*, sec. 594 (1977),[40] was recognized by this court in *Converters Equipment Corp. v. Condes Corp.*, 80 Wis. 2d 257, 264, 258 N.W.2d 712 (1977). However, even though a communication is privileged, a person may be held liable for a defamation contained therein if he abuses the privilege.

In *Ranous v. Hughes*, 30 Wis. 2d 452, 468, 141 N.W.2d 251 (1966), this court adopted the Restatement definition of what constitutes an abuse of a conditional privilege.

"The Restatement further lists the four conditions which may constitute an abuse of the privilege, and the occurrence of any one causes its loss. These are: (1)

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[40] "594. Protection of the Publishers Interest. An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that:

"(a) there is information that affects a sufficiently important interest of the publisher, and

"(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

The defendant either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing; (2) because the defamatory matter was published for some purpose other than that for which the particular privilege is given; (3) because the publication was made to some person not reasonably believed to be necessary for the accomplishment of the particular privilege; or (4) because the publication included defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given."

This case is before us on a summary judgment motion. We cannot say from a review of the record that Mertz did not abuse the privilege in making the statement concerning Denny to Santry. We therefore leave the resolution of this issue to the trial of the case.

In conclusion, we affirm the court of appeals and overturn the summary judgment on the ground that there exists a dispute over the material facts as to whether McGraw-Hill was negligent in allowing the publication of the untrue statement that Denny had been "fired," whether Mertz in fact defamed Denny by statements he made to Santry, whether those statements were privileged and, if so, was the privilege abused. We remand this case for a trial on the merits.

By the Court.—The decision of the court of appeals is affirmed and the case is remanded to the circuit court for proceedings not inconsistent with this opinion.

COFFEY, J., took no part.

HEFFERNAN, J. (*concurring*). Under the facts of this case I agree with the majority's conclusion that Denny was a private person and, accordingly, is not required to prove malice in order to prevail against the media defendant.

I would, however, apply the same standard—that of *New York Times* and its progeny—in suits against either a media or nonmedia defendant. Accordingly, I join in the reasoning of Justice Abrahamson's dissent in that respect.

Hence, Denny as a private person need not, in my judgment, prove malice in respect to his defamation suit against Mertz. I therefore agree with the mandate of the majority.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). This case involves the accommodation of two societal interests: The protection of the constitutional right of free speech and free press and the compensation for injuries to reputation.

I dissent because I conclude that by adopting a too narrow interpretation of the concept of public figure while applying the negligence standard to defamation suits by private persons against media defendants the majority does not provide adequate "breathing space" for freedom of the press and for freedom of speech. I also dissent because the majority, without adequate justification, gives non-media defendants less protection in the exercise of their constitutional right of free speech than it gives media defendants in the exercise of their constitutional right of free press.

Nature of the Plaintiff—Public Figure; Private Person. While Denny holds no public office and is not a person of such notoriety that he is a public figure for all purposes, I conclude, using the test set forth by the majority, that he is a public figure for the limited purpose of the Koehring controversy. The United States Supreme Court has not set forth a clear, easy to understand or easy to apply statement of the attributes of a public figure. The majority reads *Gertz* as establishing a two-step test for determining public figure status:

does a public controversy exist; has the defendant voluntarily thrust himself or herself into the controversy. Further, the majority correctly acknowledges that *Gertz*[1] and subsequent cases[2] frown on courts determining

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[1] The United States Supreme Court said in *Gertz:*

"[The 'public or general interest' test set forth in *Rosenbloom*] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79. We doubt the wisdom of committing this task to the conscience of judges." 418 U.S. at 346.

[2] After *Gertz* the Supreme Court has focused on the plaintiff's actions, not the substantive nature of the controversy. In *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976), for instance, Justice Rehnquist said:

"It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff."

More recently in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167 (1979), Justice Rehnquist said:

"We emphasized [in *Gertz*] that a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'"

In *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), Chief Justice Burger, quoting from *Time, Inc. v. Firestone, supra*, at 456, said:

"The 'use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.'"

Several United States Circuit Courts of Appeals have recognized in recent cases that the determination of a person's status as a "public figure" must focus upon that person's actions rather than the underlying controversy. *See Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980); *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238, 1254 (5th Cir. 1980); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 584 (8th Cir. 1980).

whether a particular controversy is a public controversy and indicates that the primary focus in determining whether the plaintiff is a public figure should be on whether the plaintiff voluntarily thrust himself or herself into the controversy. Nevertheless, the majority errs both in relying too heavily on an analysis of the substantive nature of the controversy and then in concluding that the controversy is not of public interest or concern.

The majority concludes that there was no public controversy, because "the Koehring stockholder disputes did not have an impact outside those immediately interested in the Koehring corporation." *Supra*, p. 650. The majority unfortunately never explains who it thinks are those "immediately interested in the Koehring corporation." If the phrase "immediately interested in the Koehring corporation" refers to the shareholders, the majority is talking about a dispute that has an impact on approximately 11,500 people. If the phrase "immediately interested in the Koehring corporation" refers to suppliers to and customers, competitors and employees of the corporation, and people living in communities in which plants are located (and I think all these persons can be considered as "immediately interested in the Koehring corporation"), the majority is talking about a dispute that has an impact on many thousands of people. Koehring, a *Fortune* 500, publicly owned, publicly traded, international corporation with headquarters in Milwaukee, Wisconsin, employs between 10,000 and 11,000 persons at 23 plants in the United States, Canada, Germany, France, England and Japan and has sales offices in other countries. On how many thousands must the controversy have an impact in order for the majority to consider the matter a public controversy?

Public policy favors the publication of information about publicly held business entities. Federal and state securities laws are based on the theory that disclosure

protects the integrity of the marketplace. And the marketplace affects all of us. Our country is committed to the protection of free enterprise, and great economic and social power thus rests in private hands, and private economic interests and corporate entities vitally affect the lives of all of us. Citizens have a legitimate and substantial interest in the conduct of business in this country, and the guarantee of free speech and free press includes uninhibited debate about the operations of publicly held business entities. The first amendment is not limited to the issues of politics or government. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

Instead of analyzing the substantive nature of the controversy, the majority should have asked whether the Koehring controversy was an existing publicly debated dispute into which Denny had voluntarily thrust himself before the alleged defamation occurred. It was. Before the news story in issue, Denny had sought media coverage and governmental agency attention and cooperated fully when the media sought him. For about a year before the allegedly defamatory story appeared, numerous articles appeared in the *Milwaukee Journal*, *Milwaukee Sentinel*, and *The Wall Street Journal* concerning the Koehring controversy, and the Dow Jones wire service carried word of the controversy. Hence this case, unlike *Hutchinson v. Proxmire*, is not one in which the defendants created their own defense by thrusting the plaintiff into a public debate. It was not the *Business Week* story that made Denny part of the dispute.

The majority also errs with respect to the second element of public figure status, that is, whether the plaintiff voluntarily thrust himself into the vortex of a con-

troversy. Although the majority concedes that Denny deliberately thrust himself into the forefront of the dispute to influence the resolution of the issue and also deliberately sought media coverage, the majority concludes that Denny is not a public figure because by the time Denny talked to Santry, Mertz had resigned and Denny was no longer attempting to influence a public controversy. It is obvious that even if the controversy had ended a few weeks before the story, and I am not conceding that it did, Denny had not ceased to be a public figure in regard to the Koehring controversy in the short span of a few weeks.

The majority makes the factual determination that Denny did not have media access and then concludes that because he had no access to the media he was not a public figure. The majority misreads *Gertz*. In *Gertz* the court did not say the person had to have media access to be a public figure. The court merely said in *Gertz* that public figures "usually enjoy significantly greater access" to media than private individuals and therefore the court was justified in adopting a general rule giving public figures less protection against defamation than "private persons." *Gertz*, 418 U.S. at 344. Only rarely does a public officer or public figure have such prominence as to command the type of media attention which will provide a meaningful chance to rebut defamatory falsehood and defend against it.

The majority also reasons that Denny is not a public figure because he was motivated by his private monetary interest and not a general concern for corporate governance. The majority does not explain why Denny's motivation for thrusting himself into the fray is relevant to the issue of whether he is a public figure.

Because Denny thrust himself to the forefront of a public controversy to influence the resolution of the dispute, thereby inviting media attention and comment, I

would hold that Denny is a public figure and must prove actual malice in his suit against both media and non-media defendants. Because it is clear that the plaintiff will be unable to prove actual malice at trial by clear and convincing evidence, I would affirm the judgment of the circuit court granting summary judgment for the defendant.

Standard of Proof in the Defamation of a Private Person by a Media Defendant. The majority viewing Denny as a private person adopts the "negligence standard," rather than the actual malice standard, in Denny's suit against the media defendant. The due care standard may arguably represent a fair balance of society's interest in protecting free speech and free press and society's interest in protecting private persons from injury to reputation. I therefore could be persuaded to accept the application of the negligence standard to cases involving an alleged defamation by the media of a truly "private person," if the majority did not so narrowly construe "public figure." The reason *New York Times v. Sullivan* and *Curtis Publishing v. Butts*, 338 U.S. 130 (1967), require proof of actual malice in cases involving defamation of public officers and public figures to ensure effective communication.

"Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . .

"The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.' " *New York Times v. Sullivan*, 376 U.S. at 270, quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943).

A too narrow reading of "public figure" deters media debate on public issues and contravenes the federal first amendment constitutional protection.

I believe the majority has in this case so narrowly interpreted the concept of public figure that its adoption of the standard of negligence for suits by private persons is not defensible. I can only accept the adoption of the negligence standard if the court fairly and reasonably interprets the concept of public figure in keeping with the purposes of the first amendment.

The Nature of the Defendant—Media; Non-Media. The United States Supreme Court has said that it has never decided the question "whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant." *Hutchinson v. Proxmire*, 443 U.S. 111, 133, n. 16 (1979).[3]

The majority in the case at bar undertakes the task of determining the extent to which the first amendment and the Wisconsin constitution are applicable to defamation actions against non-media persons. The majority implicitly makes a prediction that the United States Supreme Court will not extend *New York Times* and its progeny to defamatory expression by non-media persons and in the process concludes that the state constitution shall be interpreted in the same manner as the federal constitution. Thus the majority holds that the common law rules of defamation apply to non-media defendants. While this case is one in which, according to the majority, a non-media defendant (Mertz) has allegedly defamed a private person, it is unclear from the language and reasoning of the majority opinion whether the ma-

[3] Several commentators have pointed out that in the *New York Times* case the Supreme Court held that individual non-media defendants as well as the media defendants were protected by the constitutional "actual malice rule" where a public officer was involved. *See also Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Apparently the United States Supreme Court has not decided any cases in which a public figure or a private person sought damages from a non-media defendant.

jority is adopting the common law of defamation for all non-media defendants, irrespective of the nature of the plaintiff (public officer, public figure or private person), or is restricting the adoption of the common law of defamation to cases of a private person suing a non-media defendant.

I do not think we need engage in speculation as to what the United States Supreme Court will say about this issue under the federal constitution. Regardless of federal first amendment requirements, the majority has reached the incorrect result. The better approach, I believe, is that adopted by the American Law Institute in the Restatement of Torts (Second), namely the same rules of defamation are applicable to the case whether the defendant is media or non-media. I reach this result for several reasons:

(1) The majority's conclusion contravenes the state constitutional guarantee of Art. I, sec. 3 of the Wisconsin Constitution[4] which differs from the first amendment[5] in that the Wisconsin Constitution affirmatively guarantees each person the right to speak, write and publish "freely" while "being responsible for the abuse of that right." There is nothing in the state constitution to lead me to conclude that the framers intended the words "freely" and "abuse of that right" to have different

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[4] Art. I, sec. 3 of the Wisconsin Constitution provides:

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

[5] The first amendment provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

meanings for media and non-media persons. Why should a non-media defendant who defames a person have any less constitutional protection than a media defendant who defames the same person? Does the majority intend a non-media defendant to be subject to greater damages on less proof than is a media defendant? As the American Law Institute explains in the Restatement of Torts (Second), sec. 580B, Comment *e*, pp. 225–26 (1976):

". . . the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests that must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault."

The state constitution protects the right of all persons to speak, write and publish, and this court should be reluctant, without setting forth sufficient reason, to read the state constitution to create a privileged industry.[6]

(2) The majority's classification of media and non-media defendants does not withstand the defendant's challenge that the classification violates the equal protection guarantee of the state constitution.

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[6] *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781–83 (1978): "The press cases emphasize the special and constitutionally recognized role of the institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate . . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten . . . . Even decisions seemingly based on the individual's right to express himself acknowledge that the expression may contribute to society's edification."

(3) Regardless of state constitutional strictures, as a practical matter defamation law should apply equally to media and non-media defendants alike. Distinguishing between media and non-media raises the difficult question of identifying which defendants are media defendants and which are not. Are the publishers of handbills, labor union newspapers, local labor union newsletters, or neighborhood association newsletters media or non-media?

Even if defendant Mertz is not a media person, his communication to Santry was not a "private" casual communication between two "private" people talking to each other. The majority portrays Mertz-Santry as a purely private communication. It was not. Mr. Mertz was not talking to Mr. Santry across the back fence about matters of personal interest. Ex-corporate officer Mertz was talking to a reporter who was interested in writing a story about Mertz and the controversy at Koehring.

(4) The common law of defamation, apart from the relatively recent injection of constitutional considerations, is renowned for its complexity. If we apply the same rules of defamation to media and non-media defendants, we can decrease, or at least not add to, the complexity of the law, and we can move more consistency and simplicity in the law of defamation. *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 696 (1976).

(5) The general rule is that the tort of defamation is a strict liability tort. In many instances, however, the application of the doctrines of "conditional privilege" and "abuse of privilege" means that the law of defamation in operation is not a strict liability tort but is a tort based on negligence. Thus the majority's retention of the common law rules of defamation, along with the numerous privileges and their abuse, may result, in many cases, in the parties and the court unnecessarily taking a cumber-

some route to the application of a negligence standard. In the case at bar, for example, the majority refuses to apply the negligence standard but the conditional privilege appears to impose a "reasonable person" standard on Mertz. *Supra*, pp. 663, 664. See Restatement (Second) of *Torts* sec. 580B, comment *e*, pp. 230–31, sec. 592A, Special Note, pp. 259–260 (1977); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Getz v. Robert Welch, Inc. and Beyond*, 6 Rutgers-Camden L. J. 471, 511 (1975).

For the reasons set forth above, I would reverse the decision of the court of appeals and affirm the judgment of the circuit court.

William A. DENNY, Plaintiff-Appellant,

v.

Orville R. MERTZ and McGraw-Hill, Inc., Defendants-Respondents.†

Court of Appeals

No. 80-436. Argued November 20, 1980.—Decided January 15, 1981.

APPEAL from the judgments of the circuit court for Waukesha county: JOHN P. BUCKLEY, Judge. *Reversed.*

MOSER, P.J. William A. Denny (Denny) appeals from summary judgments dismissing his libel claims against McGraw-Hill, Inc. (McGraw-Hill) and Orville R. Mertz (Mertz). Judgment in favor of McGraw-Hill was entered February 27, 1980, and judgment in favor of Mertz was entered March 3, 1980. The trial court determined that Denny "thrust himself to the forefront" of a public controversy and was therefore required to establish that an allegedly libelous statement was made with actual malice. The court concluded that Denny's failure to establish actual malice entitled McGraw-Hill and Mertz to summary judgment. We disagree with the trial court and reverse.

Mertz was board chairman and chief executive of the Koehring Company (Koehring) until 1975. Denny was corporate attorney for Koehring from 1954 until 1969. Denny and his family owned about 4,400 shares of stock in Koehring and between 1969 and 1974 the value of Denny's stock dropped from $45 to $5 per share. Concerned about what was happening to stock value, Denny became a vocal protagonist against the management of Koehring. Denny and others began a campaign to remove Mertz as an officer of Koehring and to change management.

In furtherance of these goals, Denny wrote numerous letters to stockholders to obtain proxies and contacted

† Petition to review granted. COFFEY, J., took no part.

members of Koehring's board of directors. He instigated national and state securities investigations against Koehring. He wrote to the *Wall Street Journal* suggesting the newsworthiness of the events occurring at Koehring. Several stories had already appeared in the Milwaukee newspapers about shareholders' meetings and the securities investigations. The *Wall Street Journal* thereafter published a few stories on the problems at Koehring.

As a result of the efforts of Denny and his fellow dissidents, Koehring's board of directors was enlarged from ten members to twelve members, providing seats on that board for two dissident stockholders. This change in directors lead to Mertz's resignation from his position as chairman of the board on December 5, 1975.

Denny also instituted two stockholders' suits to inspect Koehring's books and shareholders' records. Those suits, as well as Denny's attendance at the annual shareholders' meeting in March of 1975, were the subjects of stories in both the *Milwaukee Sentinel* and *The Milwaukee Journal*. Denny was described as a vocal, persistent, and principal protagonist against Koehring's management policies.

Subsequent to Mertz's resignation, David G. Santry (Santry), a contributing editor of *Business Week*, wrote an article about the management overthrow at Koehring entitled *Top Management Ferment at Koehring*. That article, published on January 19, 1976, contained the following statements and formed the basis of this libel action:

> Mertz now claims he was the target of a "harrassment [*sic*] campaign" by the dissidents, who include the company's largest individual shareholder, a former chairman deposed by Mertz 16 months ago, and a former general counsel.
>
> . . . .
>
> Also about that time, William Denny, general counsel of Koehring until Mertz fired him in 1969, began to question many of Koehring's management decisions. He even sued the company twice to get minutes of meetings and other information.

In his deposition, Santry revealed that he obtained the background for the article from various telephone interviews with dissident Koehring stockholders, including Denny, whom Santry characterized as his "treasure trove of information." Denny also supplied Santry with numerous documents. Santry also interviewed both Mertz and his successor as chairman of the board and chief executive of Koehring. After the article was published, Denny called Santry and explained that he was not "fired" as that article stated, but that he resigned. Mertz also wrote Santry and stated that Denny was not fired. Mertz requested that the erroneous statement be corrected. A correction appeared in the March 1, 1976, edition of *Business Week* stating that Denny resigned and was not fired.

On October 18, 1976, Denny filed this action for libel. Both Mertz and McGraw-Hill moved to dismiss for failure to state a cause of action because a false statement that a person was "fired" could not be understood in a defamatory sense by reasonable people. The motion was denied by the trial court and was appealed to the Wisconsin Supreme Court. The Supreme Court affirmed the trial court stating: "[r]easonable people could conclude that a person's being fired would tend to injure their reputation in the popular sense or to diminish the respect or esteem that people have for him."[1] The complaint was therefore found to be legally sufficient to state a claim.

The matter was remanded to the trial court and Mertz and McGraw-Hill separately answered the complaint. After interrogatories and answers thereto were exchanged, and depositions were taken, Mertz and McGraw-Hill moved for summary judgment. The trial court held that Denny had "thrust himself to the forefront" of a public controversy, thus making himself a "public figure." He was therefore required to establish actual malice to recover for an allegedly libelous statement. The court concluded that since the affidavits, depositions and interrogatories failed to show the existence of actual malice

[1] *Denny v. Mertz*, 84 Wis.2d 654, 662, 267 N.W.2d 304, 309 (1978).

on the part of Mertz and/or McGraw-Hill, Mertz and McGraw-Hill were both entitled to summary judgment.

The overriding issue on appeal is whether Denny must establish actual malice in order to recover for libel. This can be broken down into two subissues: (1) Did Koehring's management problems constitute a matter of public concern; and, (2) If so, was Denny's involvement in and conduct with respect to Koehring's problems such that it made him a public figure.

We determine that Koehring's internal disputes and management problems were not matters of "public controversy" such that Denny's prominent role therein made him a "public figure" required to prove actual malice in a libel action. We accordingly reverse the summary judgments in favor of Mertz and McGraw-Hill.

In the seminal case of *New York Times Co. v. Sullivan*[2] the United States Supreme Court stated that before public officials can recover damages under state libel laws for a false statement relating to their official conduct, they are required to prove actual malice. Actual malice means that the claimed libelous statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.[3] This rule was designed to protect the first amendment rights of free speech and unfettered fair comment on the activities of public officials.[4] The Court reasoned that since the unhampered discussion of public issues is essential to our system of government, even erroneous statements that are "inevitable in free debate . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ."[5] The rules protecting first amendment rights are applicable to state libel laws through the fourteenth amendment.[6]

The first amendment limitations on state libel laws were later broadened to protect false statements made about a "public figure" who obtained that status either by his notorious position alone or by specific activities

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[2] 376 U.S. 254 (1964).
[3] *Id.* at 279–80.
[4] *Id.* at 269.
[5] *Id.* at 270–72.
[6] *Id.* at 277.

which thrust his personality into the vortex of an important public controversy.[7] In *Gertz v. Welch*[8] the Supreme Court made clear that the states are free to establish the standards of liability for libel where private persons are concerned as long as liability without fault is not imposed.[9]

Generally, public figures are persons who have "assumed roles of especial prominence in the affairs of society."[10] Among them are those in positions of such power and influence that they are considered public figures for all purposes. Also among them are those who have become so prominently and actively involved in an effort to influence the resolution of particular public controversies that they too are thought to have "invite[d] attention and comment."[11] This second category of persons are considered public figures for a limited range of issues.[12]

[1, 2]

It is crucial in the context of this case to recognize that "public controversies" do not include all matters of interest to the public.[13] Hence, the simple fact that an event or a controversy captures media attention and the subsequent interest of the reading public is not, in itself, enough to make the persons involved "public figures." Newsworthiness does not create a public controversy.[14] "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way."[15] A public controversy is a dis-

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[7] *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154–55 (1967). (Harlan, J. plurality).

[8] 418 U.S. 323 (1974).

[9] *Id.* at 347.

[10] *Id.* at 345.

[11] *Id.*

[12] *Id.* at 351.

[13] *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167–68 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976); *Prahl v. Brosamle*, 98 Wis.2d 130, 144, 295 N.W.2d 768, 777 (Ct. App. 1980).

[14] *Wolston* and *Prahl*, note 13 *supra*.

[15] *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

pute having foreseeable and substantial ramifications for nonparticipants.[16]

We reject the trial court's finding that the stockholders' battle at Koehring was a "public controversy." The conflicts at Koehring were, at best, newsworthy matters resulting in some general public interest.

Mertz testified at his deposition on the impact of the *Business Week* article:

> Did you ever call Mr. Santry or anybody at Business Week and make your views known?
>
> No. I decided that first not many people were going to read the article. My friends wouldn't believe it. My enemies would, and the rest of the people didn't care, so why bother.

This is a fair assessment of the limited "public" nature of the controversy.

[3]

Certainly, Denny thrust himself into the vortex or forefront of the Koehring stockholders' "battle" and attempted to have an impact on and to influence the outcome of that controversy. His activities were not trivial or tangential and he did achieve special prominence within the circle of the Koehring stockholders involved. However, the dispute was only between Koehring stockholders and management. Only those involved in the dispute would feel any appreciable impact from its resolution. It was of no substantial concern to the general public.

Further, the local press coverage of the battle was limited to the articles in *The Milwaukee Journal* on February 27, 1975, and the *Milwaukee Sentinel* on February 28, 1975, recording Denny's two attempts to get records from Koehring.[17] Two other articles recorded the annual stockholders' meeting in which Denny played a prominent role. These are the only articles in the record which made the public aware Denny's role in the "battle."

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[16] *Id.* at 1297.

[17] Although not determinative, the extent of press coverage is a relevant factor to consider in determining whether a public controversy is involved. *See id.*

The trial court held that because Denny was in contact with the *Wall Street Journal* and *Business Week*, he became a public figure. We disagree. Denny did initiate the *Wall Street Journal* contact. However, it does not follow that Denny thereby surrendered his status as a private person. Further, the record discloses that the *Wall Street Journal* printed three articles concerning the Koehring controversy on April 9, 1975, April 28, 1975, and July 16, 1975, and none of the articles made any reference to Denny.

Denny's contact with *Business Week* was initiated by the *Business Week* editor, Santry. He had three contacts with Santry through which he provided Santry with various documents relating to the Koehring dispute. Santry also contacted others involved in the Koehring dispute before the January 19, 1976, *Business Week* article was published. This contact with Santry did not convert Denny into a public figure. He was simply a source of information for an article on a matter of concern to a limited number of people.

Overall, the extent of the press coverage was minimal and the record discloses no public reaction to Denny's conduct or statements.[18]

To raise a stockholder dispute of the type involved here to the level of a "public controversy" such that its prominent participants become public figures, would be to impermissibly broaden the class of persons who must prove actual malice when they have been defamed. Such a determination might have a chilling effect on disgruntled stockholders exercising their rights to object to corporate management policies.

[4]

We have examined the pleadings, the interrogatories, and the answers to the interrogatories. We have read the depositions and the affidavits attached to the motions for summary judgment as required,[19] and hold

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[18] Public reaction is another factor to consider in determining whether one is a public figure. *See id.*

[19] *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476–77 (1980); *Wright v. Hasley*, 86 Wis.2d 572, 578–79, 273 N.W.2d 319, 322–23 (1979).

that the stockholders' battle at Koehring was not a matter of public controversy or concern. We further hold that Denny, at no time, lost his status as a private person. He did not achieve the status of a public person because of his activities as a stockholder, even though he surely thrust himself wholly into the vortex of the Koehring stockholders' "battle."

Summary judgments are reversed and the matter is remanded for trial under the restrictions of the Wisconsin libel laws.

On the day of oral argument Denny filed a supplemental appendix containing eighteen pages of excerpts from depositions that were in the appeal record. He further filed copies of sections of the *Restatement of Torts* and reported decisions that were available before the filing of his reply brief, with the exception of *Prahl v. Brosamle*,[20] which was released subsequent to the filing of his reply brief. Nowhere in the rules of this court is there provision for such late filing. We reject the documents and deny costs for their preparation.[21]

By the Court.—Judgments reversed.

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[20] *Prahl*, note 13 *supra*.

[21] *See* sec. 809.83(2), Stats.

STATE OF WISCONSIN **WAUKESHA COUNTY**
CIRCUIT COURT
BRANCH VIII

WILLIAM A. DENNY,
Plaintiff,

vs.

ORVILLE R. MERTZ and McGRAW-HILL, INC.,

Defendants.

DECISION ON MOTION FOR SUMMARY JUDGMENT OF MERTZ and McGRAW-HILL

Case No. 36559

The Koehring Company is an international corporation headquartered in Milwaukee, Wisconsin. It has four plants in Wisconsin and numerous plants elsewhere. It employes [sic] thousands of people. Its stock is traded on the New York Stock Exchange, and its activities reviewed and regulated by state and federal governments. It maintains a public relations department, regularly disseminates information on the company and its management through both Rueters [sic] and Dow Jones Wire Services for subscribers around the world. It is one of the "fortune 500."

The plaintiff, William A. Denny, was the corporate attorney for Koehring Company from 1954 to June 30, 1969, when he resinged [sic]. He and his wife owned slightly over 4,000 shares of the company's stock, which from 1969 through 1974 dropped in value from $45 to $5 per share — Denny's stock going from $190,000 to $20,000 — and dividends dropping from $8,000 annually to nothing.

Denny was concerned about the management of the company under the direction of Orville Mertz, one of the defendants. He, together with others equally concerned, set out to

remove Mertz as an officer of the corporation and to change management. To achieve this objective they began an intensive campaign during which Denny wrote numerous letters to stockholders to obtain proxies, etc.; contacted numerous employes, and had to start two lawsuits to obtain certain corporate records.

He also contacted the Securities Exchange Comission (SEC), then contacted the Wisconsin office of the Securities Commission on investments made by the Koehring Retirement Trust, as a result of which the Commission investigated the matter. His group was successful in obtaining the expansion of the board of directors from 10 to 12 members.

The Milwaukee newspapers carried several articles about the shareholders' meetings, the investigations, etc.

Up to about March 28, 1975, Denny was acting for for [sic] himself and the other stockholders and did not make any active overtures to the press, other than perhaps talking to a Milwaukee newspaper reporter. In March of 1975, however, Denny wrote a letter to the *Wall Street Journal* suggesting the newsworthiness of the events at Koehring. The contents of that letter are contained in Exhibit 22 and subsequent memorandum in Exhibit 23 of the McGraw-Hill appendix to their motion for summary judgment. *The Wall Street Journal*, thereafter, followed events at Koehring Company and carried several stories about it. *Business Week*, a national magazine, became interested in the Koehring controversy about December 5, 1975, the date when President Mertz resigned.

David Santry, a reporter for *Business Week*, began to investigate the matter and was referred to Denny. He advised Denny that *Business Week* was considering a story on the Mertz resignation. Denny, thereafter, sent Santry 188 pages of materials from Denny's files. Santry then called Denny back and obtained names of other persons connected with the controversy. Santry did what could be called an extensive investigation of the matter, which culminated in the article which is the source of this lawsuit.

In his deposition Santry described Denny as a "great source, as a person having lots of specific information" and testified "he was a treasure trove, you might say, more than willing to help."

The *Business Week* article is entitled "Top Management Ferments at Koehring," and contains a subtitle entitled "A Stockholder Revolt Ousts Chairman, End to Executive Exodus?" The article mentions Mertz; the newly elected president, Richard T. Lindgren; Carl Schwamborn, one of the directors, and others; goes into the matter of the earnings drop at Koehring; lists complaints, etc.; and generally is devoted to an overall article on why Mertz eventually resigned.

One part of the article talks about how Schwamborn began contacting various shareholders and the need to change, that Roger Shield and Robert Miller started doing the same and then states: "Also about that time William Denny, being general counsel of Koehring until Mertz fired him in 1969, began to question many of Koehring's management decisions, he even sued the company twice to get minutes of meetings and other information."

Denny commenced the suit, claiming that the word "fired" libeled him.

The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The Supreme Court, however, in *84 Wis. 2d, 654* held that the word "fired" is capable of being understood in a defamatory sense by reasonable people in the community.

Subsequent to that decision, extensive pretrial activity was commenced, including depositions and interrogatories directed to Santry, Mertz, Denny and others. Most of the narrative in this decision thus far is compiled from those activities.

During the course of discovery proceedings, Mertz testified, in response to questions by Denny's attorney, that he never told Santry that he intended to fire Denny at some time in

the future; that he never told Santry that Denny had resigned; and in response to the question:

"Q Did you tell him he was leaving?
"A No, I think I used the word terminated. That's what comes to mind when I made my notes."

Santry, in his deposition, testified as follows:

"Q Mr. Mertz, to the best of your recollection, he used the word 'fired' or 'terminated,' or don't you recall?
"A We terminated him."

In response to a question from Mertz' counsel, Santry noted the question:

"Q His statement was we terminated him. That is your recollection?
"A Yes. And his reasons for terminating him, Denny —
"Q He gave you some reasons?
"A Hotheaded, litigious, disruptive.
"Q And you are very certain that the words that he used were, 'We terminated him?'
"A We terminated him."

Santry also testified at his deposition that he concluded that Denny has been released for cause; that the basis for his conclusion included Mertz' statements,

> "coupled with Denny's description of Mertz as a manager being a martinet, an autocrat. . .
>
> "I concluded that Denny was contentious, fiesty [sic], what they call in New York a nudge, and that he and Mertz would clash and have difficulty working together.
>
> "Williams, another fellow that I spoke with, described Mertz as an autocrat, and a tough man to work with;

someone who liked toadies and lickspittles around and Denny was not exactly a lickspittle.

"Once Steelman referred to Denny's role here as a personal vendetta; certainly it looked like, you know, the man was a vengeful person, someone trying to get revenge for having been fired by this guy in 1969." (Deposition of Santry, pp. 56-57.)

About the time Denny left the Koehring Company his personal data record sheet showed, at line 12, that he was "terminated." The company employees trust advisory sheet had an "X" after the word "resignation," as the reason.

The case of *New York Times v. Sullivan*, 376 U.S. 254 (1964) decided that a news media could not be liable to a public figure for publishing any falsehood that was defamatory unless the publication was made "with actual malice" as that term was defined in the *Times'* case. The test set down in the *Times'* case was whether or not the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

In *Curtis Publishing Company v. Butz*, 388 U.S. 130 (1967), reckless disregard of the truth wsa [sic] defined as subjective awareness of probable falsity. The court stated "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication," that the publisher acted with a high degree of awareness of probable falsity.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 2d 323 it was decided that a "private" individual should not be constitutionally required to prove "actual" malice in order to recover in a defamation action even if the alleged libel occurred in the context of a discussion of a matter of public concern. *Gertz*, however, laid down some standards for determining who are "public" figures and must therefore prove malice and defined public figure as follows:

"Those who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention are porperly [sic] classed as public figures.

"More commonly those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved. In either event they invite attention and comment.

"More commonly an individual voluntarily injects himself, or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."

Denny argues that he is not a public figure and did not come within the definition of that term as laid down in the cases. He points out that he ceased to be attorney for the Koehring Company some six years before Mertz' discharge, and that except for sending to the *Wall Street Journal* a copy of two articles which appeared in the Milwaukee, newspapers about the March, 1975, Koehring annual meeting, and except for a phone call made to the reporter who talked to him at the end of the meeting, he initiated no other contacts with that news media.

He further points out that his next contact with any member of the media was in December of 1975, when he received a call from Santry. He states, "I told him that I would have my secretary copy and send to him some of the documents which might give him a little bit better flavor of what happened."

He also points out that at no time in his conversations with Santry did Santry make any inquiry as to Denny leaving the employment of the Koehring Company voluntarily or involuntarily; that he was at all times available to Santry for questions; that after he read the article he called Santry who advised him that Mertz had told him (Santry) that Denny had been fired.

The March 1, 1976, issue of *Business Week* contained a short comment that Business Week had erred in its article and that "Denny resigned, he was not fired."

Denny cites in his brief and motion papers the *Firestone* case involving a prominent socialite, and the *Wolston* case; and both parties bring the Court up to date on the latest cases including comments in the January 1, 1980, Law Week, citing a Kansas case wherein a seasoned Kansas attorney was held to be a public figure for libel purposes.

The issues, therefore, for the Court are two: Was Denny a public figure under the standards set down in the *Gertz* case; and, Two, if he was not a public figure, was the Koehring controversy a matter of public interest, which requires plaintiff to establish actual malice under Wisconsin law.

Was Denny a public figure under the standard set down in *Gertz*? It is the Court's opinion that while Denny was the attorney for the Koehring Company, even though the company was of international reputation and Denny's name could be said to be a "household word," among those of the corporate family, that this in itself did not make him a public figure, even though Koehring's activities in the industrial world are of public concern, and even though its stock is sold on the market, and even though it maintains public relations offices, etc. This does not make any one individual in the company, including top management personnel, public figures, per se.

The Court is further of the opinion that even after the campaign to oust Mertz began, some five or six years after Denny's formal relationship as Koehring's corporate attorney had ended, that Denny still was not acting as a public figure, even though he may have been "leading the troops" in the battle against Mertz.

The battle between the stockholders and management was a matter of public concern, however. So, when Denny voluntarily gave the benefit of what he had done to change management to the *Wall Street Journal*, and voluntarily cooperated

with *Business Week*, then he cannot be heard to say that he was acting as a private individual in a matter of private concern to him as a stockholder. His actions spoke louder than his words. Thus, if he was not to that date, in his mind at least — a public figure — he made himself one and brought himself within the standards of the *Gertz* case by thrusting himself to the forefront.

The one problem the Court has with this decision is that, as Denny argues, the action had been completed and the article in *Business Week* was merely a summary of what had transpired. However, the *Wall Street Journal* articles were written contemporaneously with the events; and the Court is constrained to hold that the fact that the *Business Week* article occurred after the fact is immaterial in determining the question of whether Denny was or was not a public figure, with the meaning of the cases. What is important is what he did to bring the controversy to the attention of the public; and, as Santry testified, Denny was a veritable "treasure trove of information."

On the question of malice, it is obvious, even disregarding Denny's testimony that he feels he would have a hard time proving actual malice and must rely on "gross negligence," that the Santry article was written without malice and without reckless disregard for the truth or falsity of the statement that Denny had been "fired" by Mertz. There is nothing in the record to contradict either Mertz or Santry's testimony in this regard.

Both McGraw-Hill and Mertz' affidavits, depositions and interrogatories establish a prima facie defense to the action. Denny's affidavits do not, in contradiction thereto, raise any disputed material facts or any material facts from which a reasonable inference might be drawn that Santry acted with malice. Denny in supplying Santry with the information he did, hoped to give "flavor" to the *Business Week* article. Santry added to the "flavor" in his — choice of words — but the background of the Santry investigation as described in the deposition, reveals at the most what must be described as "carelessness" in the use of the word "fired" and not reckless disregard for the truth.

Nor did Mertz act with malice. As a matter of fact Mertz has been completely exonerated from having made the statement to Santry that he "fired" Denny. The term terminated, which in the Court's opinion has been conclusively established as the term used between Mertz and Santry, is at best a neutral term.

Since Wisconsin Law requires proof of malice or reckless disregard of the truth, and since neither has been proved, the motions of both McGraw-Hill and Mertz must be granted.

Dated this 25th day of January, 1980, at Waukesha, Wisconsin.

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John P. Buckley
Circuit Court Judge

DENNY, Plaintiff-Respondent, v. MERTZ, and another, Defendants-Appellants.

No. 76-188. Submitted on briefs May 3, 1978.— Decided June 30, 1978.

APPEALS from an order of the circuit court for Waukesha county: CLAIR H. VOSS, Circuit Judge. *Affirmed.*

DAY, J. These are appeals from an order in a libel suit. The order dismissed, and in effect denied, two separate motions to dismiss a complaint for failure to state a claim upon which relief could be granted. The plaintiff-respondent, William A. Denny (plaintiff) filed the complaint on April 12, 1976, alleging that defendants-appellants, Orville R. Mertz and McGraw-Hill, Inc. (Mr. Mertz and McGraw-Hill) defamed him.[1] Mr. Mertz is alleged to have defamed plaintiff by telling an interviewer from McGraw-Hill that Mr. Mertz had fired the plaintiff. McGraw-Hill is alleged to have defamed the plaintiff by publishing Mertz's statement that he had fired plaintiff. Both defendants appealed from the order denying their motions to dismiss.

[1]

The issue is whether a false statement that an attorney was "fired" is capable of being understood in a defamatory sense by reasonable people in the community. We hold that such a statement is capable of being understood in a defamatory sense.

The facts alleged in the complaint are assumed to be true for purposes of passing on the sufficiency of the complaint. *Clark v. Corby*, 75 Wis.2d 292, 301, 249 N.W.2d 567 (1977).[2] The facts in the complaint are as

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[1] After publication of the article the plaintiff made a written demand for correction pursuant to sec. 895.05(2), Stats. 1975.

[2] *Clark* involved a demurrer under the old sec. 263.06(6), Stats. (1973) and this case involves a motion to dismiss for failure to state a claim under sec. 802.06(2)(f), Stats. 1975. However,

"The motion to dismiss for failure to state a claim upon which relief can be granted serves basically the same function as the demurrer for failure to state ultimate facts constituting a cause of action under former section 263.06(6), that is, to test the legal sufficiency of the complaint." *The New Wisconsin Rules Of Civil Procedure*: Chapters 801 to 803. 59 Marquette L. Rev. 1 (1976).

follows: The plaintiff was employed by Koehring Company from 1954 until June of 1969. On June 30, 1969, when the plaintiff was senior staff attorney, he resigned from Koehring to go into the private practice of law in which practice he was still engaged as of June 11, 1976.

From 1953 until December 5, 1975 defendant Orville Mertz was employed by Koehring Company in various executive capacities.

Defendant, McGraw-Hill, Inc., is a foreign corporation that publishes, among other things, a widely circulated weekly magazine called *Business Week*.

Prior to December 5, 1975, various Koehring Company shareholders, including Denny, were openly critical to the Koehring Company board of directors, regarding the performance of defendant Mertz as the chief executive officer of Koehring Company.

On or about December 5, 1976 defendant Mertz was terminated as chief executive officer at Koehring Company. Mertz attributed the termination to recent shareholder controversies that had focused on senior management at Koehring Company.

In December, 1975 *Business Week* collected information for an article to be published about the change in management at Koehring Company. *Business Week* interviewed various present and former Koehring managers, including Mr. Mertz. The complaint alleges that Mertz told *Business Week* that the plaintiff had left his employment at Koehring because Mertz had fired him.

In the January 19, 1976 issue of *Business Week* an article appeared entitled, "Top Management Ferment At Koehring." Among other things, the article stated that,

"Mertz now claims he was the target of a 'harassment campaign' by the dissidents, who include the company's largest individual shareholder, a former chairman deposed by Mertz 16 months ago, and a former general counsel. . . .

". . . Also about that time, William Denny, general counsel of Koehring until Mertz fired him in 1969, began to question many of Koehring's management decisions. He even sued the company twice to get minutes of meetings and other information. . . ."

The rest of the *Business Week* article states how a group of Koehring Company minority shareholders, including plaintiff, tried to force defendant Mertz's resignation. The article relates Mertz's actions as Koehring chief executive and implies that he was responsible for low management morale and the company's poor performance in recent years. The article also relates the maneuvering by the dissident minority shareholders to remove Mr. Mertz.

Most of the article concerns Mertz and not the plaintiff. The article does say that the plaintiff was fired by Mertz, but gives no reason for the firing.

On May 4, 1976, McGraw-Hill filed a motion to dismiss the complaint for failure to state a claim pursuant to sec. 802.06(2), Stats. 1975. Defendant Mertz filed a similar motion to dismiss on May 14, 1976.[3]

Following a hearing on the motions on June 14, 1976, Judge Voss denied both motions to dismiss in a decision of August 25, 1976 and by order of September 13, 1976. The defendants appealed from the September 13th order.

On June 13, 1977 the plaintiff moved for summary affirmance of the trial court's order. On July 15, 1977 this court denied the motion for summary affirmance.

Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 6, 259 N.W.2d 707 (1977), outlined the basic law of libel in Wisconsin, citing *Schaefer v. State Bar*, 77 Wis.2d 120, 122, 252 N.W.2d 343 (1977).

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[3] Both of the defendants' motions to dismiss the complaint were made pursuant to sec. 802.06(2)(f), Stats. 1975, for failure to state a claim upon which relief could be granted. However, sec. 802.06(2), Stats. provides in pertinent part that,

"If on a motion asserting the defense described in (f) to dismiss for failure of the pleading to state a claim upon which relief can be granted . . . matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08."

In this case a number of affidavits and exhibits were ". . . presented to and not excluded by the trial court." These affidavits and exhibits appear in the record. We find most of this material irrelevant to the issue on this appeal, but a copy of the allegedly defamatory article was attached to one of these affidavits and will therefore be considered.

"Initially, the court has the obligation of deciding whether a communication is capable of a defamatory meaning. . . .

"In *Lathan v. Journal Co.*, 30 Wis.2d 146, 152–53, 140 N.W.2d 417 (1966), we stated:

" 'Defamation has been defined as:

" ' ". . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." Prosser, *supra*, page 756.

" 'In *Schofield v. Milwaukee Free Press Co.* (1905), 126 Wis. 81, 85, 105 N.W. 227, we held that for a newspaper article to be libelous it ". . . need only tend to degrade or disgrace the plaintiff generally or to subject him to public distrust, ridicule, or contempt in the community. . . ."

" 'The Restatement [Torts], *supra*, page 140, sec. 559, provides that:

" ' "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." ' "

In *Schaefer v. State Bar*, *supra*, at 124, we stated:

" 'If the alleged communication is capable of a defamatory meaning, the demurrer must be overruled; and if the language is of such a character that it is capable of a nondefamatory meaning as well as a defamatory meaning, then a jury question is presented whether such communication was understood in fact in a defamatory sense by the persons to whom it was published. *Martin v. Outboard Marine Corp.*, *supra*. If the communication cannot reasonably be considered defamatory or to be so understood, the demurrer must be sustained.' *Frinzi v. Hanson*, 30 Wis.2d 271, 275–76, 140 N.W.2d 259 (1966)."

The words alleged to be libelous ". . . are to be construed and taken in their plain and popular sense . . ." *Pandow v. Eichstad*, 90 Wis. 298, 300, 63 N.W. 284 (1895).

Words or elements in an article may not be considered in isolation, but must be viewed in the context of the whole article to determine if they are defamatory. *Westby v. Madison Newspapers, Inc.*, 81 Wis.2d 1, 259 N.W.2d 707 (1977); *Waldo v. Journal Co.*, 45 Wis.2d 203, 208, 209, 172 N.W.2d 680 (1969).

Mr. Mertz and McGraw-Hill argue that "firing" is a neutral term and no defamatory meaning can be concluded.[4] However, in previous cases this court has determined that a fact question arose in libel cases where more than one meaning for a word was possible. In *Lathan v. Journal Co.*, 30 Wis.2d 146, 140 N.W.2d 417 (1966), Reverend Lathan, the pastor of a large Baptist church in Milwaukee, sued for libel because of a newspaper article that implied that he was responsible for the non-appearance of the Rev. Martin Luther King, Jr. at a fund raising rally in Milwaukee. This court stated that,

"A newspaper article that could reasonably be construed to reflect on his [Rev. Lathan's] administrative ability might well have tended to lower him in the esteem of the community." *Lathan* at 30 Wis.2d 154.

In *Wozniak v. Local 1111 of U. E.*, 57 Wis.2d 725, 734, 205 N.W.2d 369 (1973) the defendant union circulated leaflets to plaintiff's neighbors. The leaflets referred to plaintiff as a scab. On motions before and after verdict the union contended that "scab" was capable of only one meaning. On appeal, this court held that a jury question was presented. That question was whether the use of the word "scab" communicated to the neighbors the idea that plaintiff was a scoundrel, or merely the idea that plaintiff had chosen not to participate in the strike.

Mr. Mertz and McGraw-Hill also rely on cases from other jurisdictions holding that it is not defamatory to state that a person has been fired, dismissed or removed from a position without giving a reason for the removal. *Picard v. Brennan*, 307 A.2d 833 (Me. 1973); *Nichols v. Item Publishers*, 309 N.Y. 596, 132 N.E.2d

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[4] McGraw-Hill cites a number of books and articles for the proposition that being fired is a common experience among corporate executives. These materials are not in the record and not properly before the court. Even if the books and articles were proper subjects for judicial notice this argument misses the point. The question is not what is common in the business community, but how would reasonable people in the community react to the information. *Westby* at 81 Wis.2d 6.

860 (1956). However, these cases both applied different libel law than what this court has articulated in *Westby* and the cases cited therein.

In *Picard* the court held that a false charge that a person was fired or dismissed was not slanderous per se. In *Nichols* a false statement that a minister had been removed from his pastorate was not libelous per se. Both New York and Maine, where these cases were decided, follow the rule that a statement may be defamatory if it affects a person in his office, profession or trade.[5]

But these jurisdictions distinguish between libel per se where no special damages need be proven, and other libel cases where such damages must be shown. In *Picard* and *Nichols* there was no mention of any special damages and the court held that the statements were not libelous or defamatory per se. If special damages had been shown in *Picard* or *Nichols* the result might well have been the opposite.

[2]

Wisconsin law does not distinguish betwen libel per se and libel based on special damages. In *Martin v. Outboard Marine Corp.*, 15 Wis.2d 452, 460, 461, 113 N.W.2d 135 (1962) this court adopted the position of sec. 569, Restatement, 3 Torts, that all libels are actionable without alleging or proving special damages.[6] Moreover, in judging the sufficiency, of this particular complaint, we note that the plaintiff alleged damage to his reputation in the amount of $500,000.

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[5] *Nichols* at 132 N.E.2d 862. *Picard* at 307 A.2d 834.

[6] Restatement, 3 Torts, Defamation, p. 165, sec. 569:

"*Liability Without Proof Of Special Harm, When Imposed—Libel.*

"One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

Defamation is defined in sec. 559, p. 140, as "A communication [that] tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

The defendants contend that the statement that plaintiff was fired could carry no bad connotations that would harm plaintiff's reputation in the community. The complaint alleges that the plaintiff was defamed because of a false statement that he was fired by Koehring. The *Business Week* article gave no reasons for the firing. It does not say that the firing was for incompetence or cause or for any particular reason at all.

The defendants also argue that the article as a whole tends to vindicate the plaintiff. The article is much more critical of defendant Mertz than it is of the plaintiff. The plaintiff is mentioned as a member of a group of dissidents who questioned Mertz's bad management decisions and who were successful in a rare example of corporate democracy. The major portion of the article certainly does not defame plaintiff, but there is nothing in the article to suggest that the plaintiff was fired for questioning Mertz's decisions. Such a conclusion might be implied from the article, but then again it might not.

[3]

The parties agree that to fire means to discharge from employment peremptorily or summarily.[7] Both the statement that plaintiff was fired and the article as a whole could be understood by reasonable people in a defamatory sense. Reasonable people could conclude that a person's being fired would tend to injure their reputation in the popular sense or to diminish the respect or esteem that people have for him. Whether the article would actually have that effect is a question for the jury. We only hold that this complaint is not legally insufficient to state a claim.

By the Court.—Order affirmed.

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[7] *Webster's Third New International Dictionary* (G. & C. Merriam Co. 1961), p. 854.

STATE OF WISCONSIN **WAUKESHA COUNTY**
CIRCUIT COURT

WILLIAM A. DENNY,

Plaintiff,

vs. **Case No. 36559**

ORVILLE R. MERTZ, and
McGRAW-HILL, INC., a
foreign corporation,

Defendants.

DECISION

The above-entitled matter having come on for hearing before the court on June 14, 1976, pursuant to motions to dismiss, brought by the respective defendants. The plaintiff appearing by Attorney Andrew O. Riteris; the defendant Orville R. Mertz appearing by Attorney L. C. Hammond, Jr.; the defendant McGraw-Hill, Inc., appearing by Attorney Don S. Peterson. Each of the defendants moved to dismiss the plaintiff's complaint on the ground that the complaint fails to state a claim upon which relief can be granted. The court having taken the matter under advisement for written decision with leave to file briefs, which have been received and reviewed, now, therefore, finds and determines as follows:

The plaintiff's cause of action is for libel for the publication of a false statement that the plaintiff, William A. Denny was fired from the position of General Counsel of the Koehring Company. The alleged libel is attributed to the defendant, Orville R. Mertz, and allegedly published in McGraw-Hill publication *Business Week* magazine of January 19, 1976. The defendants contend that the single word "fired" is not capable of a defamatory meaning. The plaintiff contends that the word

"fired" is capable of a defamatory meaning within the whole context of the communication contained in the magazine article.

> "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, the test being whether the communication is capable of such meaning, and if reasonable men might differ, the question is for the jury." 58 Wis (2d) 359

> "It is the function of the trial court to determine in the first instance whether a communication published in the form of libel or slander is capable of a defamatory meaning. If the trial court determines that the communication complained of is capable of an innocent meaning as well as a defamatory meaning, it is then for the jury to determine whether the communication capable of a defamatory meaning was so understood by its recipient. In determining whether a communication is defamatory, the whole context of the communication should be construed with the alleged particular words of defamation if there is an integral relationship between the contents and the alleged words. In determining whether the communication complained of is capable of a defamatory meaning and also in determining whether the defamatory meaning was understood by the recipients, the surrounding circumstances under which the alleged libel or slander was published must be taken into consideration." 15 Wis (2d) 452

It is the opinion of the court within the context of the magazine article that the use of the reference that Mr. Denny was "fired" could lead reasonable men to differ in understanding the statement as being defamatory.

Upon the entire record the motions and each of them seeking dismissal of the complaint are denied with statutory costs awarded to the plaintiff.

Dated at Waukesha, Wisconsin, this 25th day of August, 1976.

BY THE COURT:

Circuit Judge

BUSINESS WEEK
January 19, 1976

TOP MANAGEMENT FERMENT AT KOEHRING

A stockholder revolt ousts the chairman. An end to executive exodus?

In one of those rare instances where a stockholder revolt worked, disparate groups of minority shareowners last month teamed up to topple Orville R. Mertz, the 57-year-old chairman and chief executive of Milwaukee-based Koehring Co. Now the dissidents, who collectively own or control about 20% of the machinery maker's voting stock, are trying to unite behind the newly named CEO, President Richard T. Lindgren, formerly of Mead Corp.

Mertz now claims he was the target of a "harassment campaign" by the dissidents, who include the company's largest individual shareholder, a former chairman deposed by Mertz 16 months ago, and a former general counsel. As the dissidents see it, the effort to remove Mertz grew out of the company's dismal performance in recent years. Earnings dropped from $10.4 million on $368 million in sales in fiscal 1973 to $5.4 million on $377 million in sales in 1974. Earnings for the nine months ended last Aug. 31 were up, but much of the gain came from nonrecurring items. The dissidents claim that management turnover was high and morale low, and they saw little prospect that Mertz would turn the company around and pull up the stock price from $8 a share, down from the high 30s when Mertz took over as CEO in 1967.

Directors under fire. Although the dissidents applauded the board's move last summer to bring in Lindgren as president, they blame the directors for not forcing Mertz to resign sooner. They may try to make several changes in the slate of directors chosen this month and to be voted on at the annual meeting in March.

One of the directors most likely to remain is Karl Schwamborn, 44, a group vice-president and owner of 10% of Koehring's stock. Indeed Schwamborn, who lives in Germany but flies to Milwaukee monthly, has turned out to be a Trojan horse for Mertz. When Mertz acquired Schwamborn's West German roadbuilding equipment company in 1970, he got not only a profitable property but also a formidable critic, who was armed with the largest block of voting stock. This enabled Schwamborn to become a director last spring and to play a key role in bringing in Lindgren and forcing Mertz out.

Schwamborn says that it took him about a year to size up Mertz. "He failed to exert management leadership and control the operations side," Schwamborn says. "He neglected product development, marketing performance, and seeing to it that necessary manufacturing changes were undertaken." When Schwamborn realized this, he and Mertz clashed.

Many complaints. Schwamborn was not alone in his dissatisfaction with Mertz. Former executives say that it became increasingly frustrating to work at Koehring. Robert E. Williams, a former general manager who left Koehring in 1974 after 21 years, says budgeting and planning became a "ritual of numbers with no analysis of reality." Williams says Mertz's lack of discipline and direction is exemplified by the decision to move the company's Lorain division (cranes) from its home in Lorain, Ohio, to a new plant in Chattanooga that it had bought from Lockheed. "After the move was under way, they ran out of space and could not complete it," says Williams. Other former executives complain of excessive overhead charges to pay for Mertz's burgeoning staff of marketing, data processing, and financial experts.

In 1974, Schwamborn became concerned about the morale of management when several executives threatened to quit. Schwamborn even went to Mertz and suggested that Mertz quit in July of that year. Mertz refused.

The moves begin. About that time, according to Schwamborn, then-chairman Julien R. Steelman proposed to directors that he

temporarily be given the title of CEO and that Mertz be redesignated senior vice-president for finance. Steelman also proposed that a search for a new leader be started. At the September, 1974, board meeting, Steelman's power play failed, and he retired, leaving Mertz as chairman as well as CEO.

Schwamborn says Steelman returned to his ranch in California and began contacting various shareholders about the problems of the company and the need for a change. Separately, stockholders Roger E. Schield and Robert Miller, with about 70,000 shares between them, started doing the same thing. Also about that time, William Denny, general counsel of Koehring until Mertz fired him in 1969, began to question many of Koehring's management decisions. He even sued the company twice to get minutes of meetings and other information. This festering dissatisfaction erupted at the annual meeting in March, 1975, when Edward Hill, a former director, moved to increase the board from 10 to 12 and nominated Schwamborn and Schield as directors. The move was defeated but, says Schwamborn, "for the first time, management and the board of directors became aware that great unrest was growing among shareholders and that the company was in upheaval."

Mertz soon relented and accepted Schwamborn as a director. Lindgren became the 12th director last July when he was brought in as president. Mertz, in fact, supported Lindgren for the job. However, Schwamborn says, the loyalty of some directors shifted from Mertz to Lindgren. Schwamborn adds pressure from shareholders to replace Mertz was growing. In December, the board asked for and received Mertz's resignation.

Mertz feels he strengthened Koehring before he left. More than $60 million in short-term debt was paid off, virtually eliminating short-term borrowing. Moreover, Koehring has a new strategy to restrict itself to three businesses: cranes and shovels, compaction equipment, and hydraulic components and specialty products. Already Koehring has sold off five operations that either do not fit in or else lose money. Lingren agrees

with this. "Before," he says, "you name it, Koehring made it — including a blueberry picker."

MILWAUKEE SENTINEL
March 22, 1975

Koehring is Scene of Debate
SHAREOWNERS' MOVE FAILS

An effort to expand the Koehring Co. board to include two representatives of a dissident shareowners' group failed Friday.

A series of moves at the annual meeting of Koehring stockholders here followed Board Chairman Orville R. Mertz's summary of a 1974 slump and a report of gains in the first quarter of the current year.

The gains were attributed to curtailed operations and major retrenching efforts on the part of the diversified manufacturing company headquartered here.

It also followed reports last month of a suit to open the shareowner lists and minute books of the company. The management of the corporation had resisted the inspection, which many observers believed signaled a proxy fight.

Voting proxies received in advance, the management team re-elected two directors of the company — Dana J. Schneider, retired president of Koehring's HUSCO Division, and Philip A. Singleton, president of Singleton Associates International, a consulting firm in Amherst, Mass.

Two men, including a vice president and the highest paid executive at Koehring, were nominated for election to the board after the bid for board expansion failed during a near four hour session at the headquarters of the Koehring Division of the company, 3026 W. Concordia Ave.

They are: Karl H. Schwamborn, Boppard, West Germany, vice president in charge of operations for Koehring's

compaction group, and Roger Schield, Coldwater, Mich., the son of the former head of the Bantam Division of Koehring, in Waverly, Iowa.

Both men are major stockholders, they indicated. Schwamborn, who also is president of Koehring GmbH, a wholly owned subsidiary in West Germany, earned $194,235 last year, according to proxy solicitation material. Mertz earned $105,269 in direct compensation and remains at that rate, he indicated Friday.

At least one leader of the vocal group of dissident shareowners indicated she wanted Mertz to resign his post, reportedly in favor of Schwamborn.

Noting that the company's stock tumbled to a low of $3.50 a share last year and dividends were omitted in the third and fourth quarters, Mrs. Susan Vincent, Pompano Beach, Fla., suggested that "Mr. Mertz has taken the company nowhere but downhill."

But Irving W. Escarraz, Olympia Fields, Ill., a management critic, indicated he was interested in bringing in new directors to review the company's situation.

"There is much good to be found here," he said at one point during the prolonged debate at the meeting.

He argued earlier in the session that the management had described 1974 — Koehring earnings slumped to $5,373,000, or $1.25 a share, from $10,423,000, or $3.02 a share — as "challenging."

"The challenge was not met," he said. "The market price of your stock (which dropped to $3.50 a share last year before regaining its present level of approximately $9) reflects the management and the failure of management to meet the problems."

Principal spokesman for the critics was Atty. William A. Denny, who headed Koehring's legal department for 14 years prior to 1969 and was the author of the suit to open the management filed last month.

Denny reportedly holds 4,400 shares of Koehring stock. The attorney noted that Koehring had reduced the number of directors from 12 to 10 a few years ago. He urged a recess while the incumbent directors met to change the corporate bylaws to restore the board seats.

Mertz indicated the board would consider the matter at its next meeting.

The chairman also indicated he believed the board could be expanded and would be expanded.

The move to bypass the management slate began with a statement by Robert G. Miller, of Benton Harbor, Mich., who indicated he discussed board expansion with directors last December and recommended that Shield and Schwamborn be added. He said he voiced opposition to a corporate policy which limited board membership to a maximum of two inside directors.

Miller formerly managed Koehring operations in Benton Harbor.

Robert E. Williams, a stockholder and another one-time divisional manager, nominated Schwamborn and Schield.

Charles W. Walton, a vice president, general counsel and secretary of the corporation, indicated the matter would be complicated.

"We haven't had a ballot in several years," he said.

"That's exactly the problem, a shareowner shouted.

In the final tally, Schwamborn garnered 384,967 votes and Schield 384,739. Schneider and Singleton received 2,186,958. The count is subject to Denny's challenges of some proxies Monday.

During the meeting, Mertz reported shipments of $96,778,000 — an 11% gain from a year ago — during the fiscal quarter ended Feb. 28. Profits rose 12% to $1,270,000, or 29 cents a share, he reported.

"We would like to lower our dependence on construction so as to lessen the effect of cyclical swings on our sales and earnings," he observed. "We also sought to position ourselves in markets in which we would face competition primarily from companies of our own scale."

"During 1974, we devoted considerable effort to disposition of those parts of our business that do not fit our plan," he added. "No such major dispositions have as yet resulted, but we do expect significant progress in this area during 1975."

It is some of those moves that the dissident group seeks to review, Denny indicated later.

THE MILWAUKEE JOURNAL
February 27, 1975

STOCKHOLDER IN KOEHRING FILES SUIT

A major stockholder in Koehring Co. appeared in Circuit Court Thursday to seek a court order to permit him to inspect the corporate minutes and shareholder records of the company.

William A. Denny, Elm Grove, a lawyer who said he headed Koehring's legal department until 1969, said he owned 4,400 shares of stock in the company. He claimed that he was denied access to the corporate records by Charles W. Walton, secretary of Koehring.

Circuit Judge Robert W. Landry, after hearing testimony on Denny's request, said he would give a decision Thursday afternoon.

Denny's petition stated that the market price of a share of Koehring stock was about $45 in 1969 and that a share is now worth about $7.

He claimed that he believed he was refused permission to inspect the records "to make it more difficult for (him) to solicit proxies for the annual meeting of the shareholders" on March 21.

A legal document submitted by Walton denied that Walton refused Denny this information but said that he informed Denny that he wanted time to discuss Denny's request with lawyers.

MILWAUKEE SENTINEL
February 28, 1975

KOEHRING HOLDER WINS PLEA

The Koehring Co. was ordered Thursday to open its books and shareholder records to an Elm Grove attorney who is a substantial shareholder in the company.

Circuit Judge Robert W. Landry said William A. Denny is entitled to an inspection of the company data from 1968 to the present.

The judge ruled that Koehring must comply with his order by 1 p.m. Monday.

Denny, a former head of Koehring's legal department, had petitioned the court after he said he was denied access to the books and records by Charles W. Walton, secretary of Koehring.

Denny testified that he believed he was turned down to make it more difficult for (him) to solicit proxies for the annual meeting of the shareholders' scheduled for March 21.

Denny said he owns 4,400 shares of Koehring stock. He said in his petition that the stock was valued at $45 a share in 1968-'69 and is now about $7 a share.

THE MILWAUKEE JOURNAL
March 22, 1975

REBEL KOEHRING SHAREHOLDERS LOSE ROUND TO MANAGEMENT

Old acquisitions came back to haunt Koehring Co. Friday, in the wake of low earnings last year, the suspension of dividends and a fall in the price of its stock.

Substantial stockholders whose holdings resulted from Koehring acquisitions of other companies and some who were former executives of the company spearheaded a rebellion at the Koehring annual meeting.

While they failed by a large margin to pass a motion to increase the board from 10 to 12 and to replace two board members with their own nominees, all was not in vain.

In a meeting that lasted more than three and a half hours and was marked by determination and procedural maneuvering by the dissidents, Orville R. Mertz, chairman and chief executive officer, assured the challengers that the board would consider increasing its membership and indicated that it probably would.

But, he said, selection of director candidates is a primary responsibility of the board and the selection should be made carefully.

1st Quarter Profit Up

He pointed out that there had been ample opportunity to have the proposal for increasing the size of the board included in the proxy statement for the annual meeting and to wage a proxy campaign for new directors.

Mertz's report of a 12% increase in earnings in the first fiscal quarter ended Feb. 28 did not appear to defuse the opposition.

Earnings increased to $1,270,000 or 29 cents a common and common equivalent share, fully diluted, from $1,130,000 or 25 cents a share, fully diluted, a year earlier. Shipments rose 11% to $98,778,000 from $87,385,000) though the physical volume of shipments declined substantially.

For the fiscal year ended last Nov. 30, net income dropped to $5,373,000 or $1.25 a share from $10,423,000 or $2.91 a share a year earlier. Shipments totaled $377,097,000, compared with $367,829,000 in fiscal 1973.

Dividend Last May

Koehring paid its last dividend in May, 1974. The high for its common stock was $18 a share on the New York Stock Exchange in 1974 and the low $3.50. Friday it closed at $9 a share.

Among actions calculated to improve profits, Mertz said, are contemplated major dispositions of less profitable businesses.

Koehring manufactures a wide range of construction, farm and forest equipment and machinery for the plastics industry.

Through the years it has picked up some of its product lines through acquisitions by means of stock exchanges. Friday, dissidents included former heads of acquired firms or relatives.

Generally, the dissidents wanted to pump new blood into the board and to include directors with substantial stock holdings, asserting that all but two of the directors were not in management, some were inactive and too many held relatively little stock.

As Vern Shield, whose Shield Bantam Co. in Waverly, Iowa, was taken over by Koehring, put it: "They (present management) just can't seem to make any money. . . . We need somebody who knows how to make machinery."

He and others said Koehring was a good company and had good products but wasn't making the money it should.

Individually, the dissidents registered complaints about Mertz's $105,000 salary, said pensions officers would get were too high and questioned such things as specific investments by the employe profit sharing fund and the Lifo (last in, first out) method of accounting.

Under Lifo the cost of goods sold is based on the most recent prices paid for inventory items, thus reducing the ballooning effect of inflation on net profits.

Koehring has been using it since 1956, but recently many companies have switched to Lifo to squeeze inflation out of reported profits, thereby reducing income taxes.

At Disadvantage

Mertz said it was only fair to recognize that Koehring's reported profits would tend to compare unfavorably with companies that didn't use that form of accounting. And one of his sharpest critics at the meeting, Irving W. Escarraz, in the construction business in Olympia Fields, Ill., who raised the issue, finally said:

"There's a lot of money here that is in the accounting . . . . There's a lot of good here."

One of the most vocal and persistent in procedural moves was William A. Denny, Elm Grove, a lawyer who headed Koehring's legal department before leaving in 1969.

Denny, who says he owns 4,400 Koehring shares, went to court last month to get access to corporate minutes and shareholder records which the company contends he would have gotten anyway.

One is Koehring Officer

It was others, however, who made the motion to increase board membership and nominated two candidates.

The defeated candidates were Robert E. Shield, son of Vern, who runs two businesses in Coldwater, Mich., and Karl H. Schwamborn, corporate vice president of operations and president of Koehring GmbH, West Germany, renamed from a compaction equipment from Koehring acquired in 1970.

The proxy statement listed Schwamborn's remunerations in fiscal 1974 as $194,235.

Schwamborn did not comment on the issues, nor did he try to decline the nomination.

Only two directors were up for re-election: Dana J. Schneider, retired president of the company's Husco Division, and Philip A. Singleton, president of Singleton Associates International, an Amherst (Mass.) industrial consulting firm.

While a number of shareholders withdrew their proxies to management at the meeting, management still had enough proxies to re-elect Schneider and Singleton by an announced vote of 2,186,958 to 384,967.

The dissidents included Robert C. Miller, who headed Benton Harbor (Mich.) Engineering before it was acquired by Koehring; Edward B. Hill, who was Koehring vice president and assistant to the president before retiring in 1971, and Robert E.

Williams, general manager of Benton Harbor Engineering before he resigned a year ago.

THE MILWAUKEE JOURNAL
April 8, 1975

Koehring Buys Stock From Pension Trust

Koehring Co., has repurchased from the Koehring Retirement Trust for employes 100,000 shares of the company's common stock at the same price the trust paid in January, 1974.

The price was $16 a share, for a total of $1,600,000. On the day of the repurchase last week, the stock closed at $7.625 a share on the New York Stock Exchange.

Shareholders raised questions about the trust's purchase of the stock at the company's recent annual meeting.

As explained in the proxy statement for the meeting and the firm's annual report, the agreement between Koehring and the trust provided that the company would buy back the shares at the price the trust paid if the trust requested within two years.

In disclosing the repurchase, Charles W. Walton, Koehring vice president-general counsel and secretary, said it was common for an employe pension fund to buy a company's stock and that the agreement had been approved by the US Treasury Department and the New York Stock Exchange.

Orville R. Mertz, Koehring chairman and chief executive officer, said at the annual meeting that at the time of the trust's purchase it was anticipated that the market price of Koehring stock would increase but that the safeguard for the trust's investment was incorporated in the agreement.

Koehring paid common stock dividends in February and May last year but has not paid any since because of a sharp decline in 1974 earnings.

THE WALL STREET JOURNAL
April 9, 1975

Koehring Purchases 100,000 of Its Shares

Milwaukee — Koehring Co. said it purchased 100,000 of its shares held by the company's retirement trust for employes at $16 each.

The shares were acquired under an agreement that was made with the trust when the stock was purchased from Koehring in January 1974.

On the day of the purchase, the stock closed on the New York Stock Exchange at $7.625 a share.

The trust had the option of requiring repurchase of the shares at its acquisition cost at any time within two years.

MILWAUKEE SENTINEL
April 26, 1975

Koehring Critic Fills Post

A vocal critic of the management of the Koehring Co. here was added to the manufacturing firm's board of directors Friday.

He is Karl H. Schwamborn, vice president in charge of operations for Koehring's compaction group and president of Koehring GmbH, Koehring's West German subsidiary. He also reportedly is the highest paid executive in the Koehring organization, earnings $194,235 last year, compared with the $105,269 salary paid to Orville H. Mertz, chairman of the company's board.

The leader of a group of critics at the annual meeting of Koehring shareowners here last month suggested that Schwamborn might be a candidate to succeed Mertz.

The decision by the board of directors expands the board to 11 members. Schwamborn's appointment is subject to shareowner approval at the 1976 meeting, a spokesman said Friday.

Directors Friday also declared quarterly dividends on the preferred stock of the company, to be paid June 30 to shareowners of record on June 15. The amounts: 62½ cents for Series F, 37½ cents a share for Series G, 68¾ cents for Series H, and 62½ cents for Series I.

THE MILWAUKEE JOURNAL
April 26, 1975

Koehring Fills Board Post

Karl H. Schwamborn, operations vice president for the Koehring Co. compaction group and president of Koehring GmbH, a West German subsidiary, has been appointed to the Koehring board of directors.

Directors voted to amend the company's bylaws to increase board memberships to 11 persons. Stockholders had been informed at the firm's annual meeting last month that the board was considering the expansion.

Although Koehring directors are elected for three year terms, Schwamborn's appointment must be voted on at the annual meeting next year, the firm said.

THE WALL STREET JOURNAL
April 28, 1975

Koehring Corp. Names Dissidents' Choice To an Expanded Board

Milwaukee — Responding to pressure from dissident shareholders, directors of Koehring Corp. expanded the board to 11 from 10 and filled the vacancy with a Koehring executive

whom dissidents had tried to elect a director at the annual meeting in March.

The new board member is Karl H. Schwamborn, 43 years old, president of Koehring G.m.b.H., a West German subsidiary of the machinery maker. He was president and general manager of the German unit's predecessor, Bopparder Maschinenbaugesellschaft M.b.H., commonly known as Bomag, when Koehring acquired it in 1970. He became president of the subsidiary in 1972 and last year took on additional responsibilities as Koehring's vice president, operations, for its compaction group.

At Koehring's annual meeting, dissident stockholders nominated from the floor Mr. Schwamborn and Roger Schield, son of a former head of Koehring's Bantam division, in opposition to two incumbent directors up for reelection. Management held sufficient proxies to elect its two nominees easily, but Orville R. Mertz, chairman, assured holders at that time the board would consider increasing its membership.

MILWAUKEE SENTINEL
July 16, 1975

Lindgren Designated To Be Koehring Chief

The Koehring Co. has selected Richard T. Lindgren to become its president and chief operating officer, it was announced Tuesday.

Lindgren has served as executive vice president of the Mead Corp. in Dayton, Ohio, since 1972. Earlier, he was vice president of the agricultural equipment group of the Allis-Chalmers Corp.

The announcement of Lindgren's selection was made by Orville R. Mertz, chairman and chief executive officer of the big Milwaukee based construction equipment manufacturer.

Mertz said plans call for Lindgren to be elected to the presidency at a directors' meeting July 25.

Lindgren, 48, will succeed David W. Marchant, who has been president since last September. Marchant, 67, will be named vice chairman at the July 25 meeting, according to the announcement.

Lindgren holds degrees from the University of Minnesota and the Harvard Graduate School of Business Administration. He was with the Ford Motor Co. prior to his service with Allis-Chalmers.

Mertz became chairman last September after having been president of Koehring for more than seven years. He succeeded Julien R. Steelman, who resigned to open the way for the promotion of Mertz and the election of Marchant to the presidency.

Marchant had been senior vice president, operations-hydraulics and special products group. He was assigned the duties of chief operating officer when he was elected president.

Mertz has been chief executive officer since 1967.

Koehring management came under attack from dissident stockholders at the firm's annual meeting last March. Company earnings in 1974 were sharply under those of 1973.

Subsequent to the annual meeting, Koehring directors expanded board membership to 11 with the naming of Karl H. Schwamborn as a director. Schwamborn is vice president of operations for Koehring's compaction group and president of Koehring GmbH, a West German subsidiary. He is a major Koehring stockholder who has the support of the dissident stockholder group.

Late in June Koehring reported earnings of $1,516,000 or 38 cents per share for its second quarter ended May 31. That compared with a loss in the similar period of 1974.

Six month earnings were $2,786,000 or 67 cents a share as against $1,251,000 and 16 cents a share the prior year.

"Since our industry usually lags major economic swings by six months to a year," Mertz said at the time, "we expect continued slackening, but at a more moderate pace as the economy bottoms and begins to turn upward in the second half."

THE MILWAUKEE JOURNAL
July 16, 1975

KOEHRING TAPS NEXT PRESIDENT

Richard T. Lindgren, executive vice president of Mead Corp., Dayton, Ohio, has been selected as the next president and chief operating officer of Koehring Co., manufacturer of construction, agricultural and forest equipment.

Orville R. Mertz, chairman and chief executive officer, said Lindgren's election was scheduled at the next board of directors meeting July 27.

Lindgren, 48, will succeed David W. Marchant, 67, president, since September, 1974. Marchant is to be named vice chairman.

Before joining Mead in 1972, Lindgren was group vice president of Allis-Chalmers Corp.'s Agricultural Equipment Group. He earlier held various positions in engineering, finance and marketing, principally with Ford Motor Motor Co., where his last position was director, marketing operations.

Marchant has been with Koehring since 1946. He was senior vice president of operations for the Hydraulics and Special Product Group before he was elected president, succeeding Mertz, who then became chairman.

THE WALL STREET JOURNAL
July 16, 1975
Who's News

Koehring Co. Selects Lindgren as President

MILWAUKEE — Koehring Co. said Richard T. Lindgren, executive vice president of Mead Co., Dayton, Ohio, has been designated president and chief operating officer and will be elected at the directors meeting July 25.

Mr. Lindgren, 48 years old, succeeds David W. Marchant, 67, who has been president since September, and who will be named vice chairman, a new position, at the meeting.

Before joining Mead, Mr. Lindgren was group vice president of the agriculture equipment group of Allis-Chalmers Corp., Milwaukee. Koehring makes construction equipment and industrial machinery.

THE MILWAUKEE SENTINEL
December 6, 1975

LINDGREN IN, SHAREOWNER PROBLEMS CITED
MERTZ STEPS DOWN AT KOEHRING CO.

In a surprise move late Friday, Orville R. Mertz stepped out as chairman of the board and chief executive officer of the Koehring Co. here.

The 57 year old executive said his move was prompted, in part by "shareholder controversies."

Richard T. Lindgren, 48, president of the big manufacturing company since last July, will retain the post and assume the additional responsibilities of chief executive officer, a corporate spokesman said.

Lindgren moved to Koehring from his job as executive vice president of the Mead Corp. to succeed David W. Marchant who had held the presidency since September of 1974. Marchant, who also has announced retirement plans, had been vice chairman of the Koehring board.

Lindgren was a group vice president and head of the agricultural group at Allis-Chalmers Corp. here.

"An important reason for my action is to relieve Koehring of shareholder controversies that have focused on senior management during the recent difficult period in the company's affairs," Mertz said in a statement issued in conjunction with the corporate announcement of the change.

He did not elaborate and could not be reached for comment late Friday but the controversy surfaced at the annual meeting of the company's stockholders last March when dissident shareowners attempted to expand the board to include two representatives of the group.

One of the nominees, Karl H. Schwamborn, was added to the board in April. Schwamborn is vice president in charge of operations for Koehring's compaction group and president of Koehring GmbH, the Milwaukee based company's subsidiary in West Germany.

As such, he reportedly was the highest paid executive in the Koehring organization, earning $194,235 last year compared with the $105,269 salary paid to Mertz.

The leader of the corporate critics at the shareowners' meeting suggested last March that Schwamborn was a candidate to succeed Mertz as board chairman.

The company has been encountering problems and this year has been busily selling off five wholly owned subsidiaries and its 25% interest in a Japanese venture.

In the 20 years preceding 1973, the widely diversified company made 45 acquisitions.

The selloff was designed to improve profitability by elimination of marginal operations, Mertz said in a recent interview.

Short term debt has been virtually eliminated, he added Friday.

"Now that these programs have been completed, the resources of Koehring can be concentrated in the areas of the greatest growth and profit potential," said Mertz, who also is chairman of the Wisconsin Manufacturers Association. "I leave the company confident that it can resume its long history of growth and leadership in the machinery industry."

WALL STREET JOURNAL
December 8, 1975

KOEHRING CO.'S MERTZ RESIGNS TOP POSITIONS; LINDGREN NAMED CHIEF

MILWAUKEE — Dissatisfaction among Koehring Co. shareholders and directors with management performance culminated in the resignation of Orville R. Mertz, 57 years old, as chairman and chief executive officer. Richard T. Lindgren, 48, will continue as president and succeed Mr. Mertz as chief executive. The post of chairman will remain vacant.

Mr. Lindgren was brought in as president last July from Mead Corp., Dayton, Ohio, where he had been executive vice president.

THE MILWAUKEE JOURNAL
December 6, 1975

KOEHRING CHAIRMAN QUITS

Dissension within the Koehring Co. board of directors that started before the company's last annual meeting of stockholders in March culminated Friday in the resignation of Orville R. Mertz as chairman and chief executive officer.

Announcement that Mertz had resigned, effective immediately, was disclosed late Friday afternoon after a board meeting that began in the morning.

Richard T. Lindgren, 48, who was brought in as president of the company in July, was given the title of chief executive and continues as president.

Criticism of Mertz. Mertz, 57, said in announcing his resignation: "An important reason for my action is to relieve Koehring of shareholder controversies that have focused on senior management during the recent difficult period in the company's affairs."

Mertz took a considerable amount of indirect criticism at the shareholders' meeting March 21 — a 3½ hour session in which large stockholders and former company executives spearheaded a rebellion against management.

The critics insisted that a company like Koehring, which manufactures machinery and heavy equipment for the construction, farm and forestry industries, should make more money if management was doing a good job.

The dissidents tried, without success, to replace two directors with nominees of their own choice. They also complained that Mertz's $105,269 a year salary was too high and that some executives were in line to get too much money in pensions.

Koehring, which has about 7,000 employes in 26 plants, including 1,260 in Wisconsin, has not paid a dividend to stockholders since May, 1974, a year in which profits plunged 51.5% to $5.4 million or $1.25 per share. Sales last year edged up to $377 million from $367.8 million in 1973.

Moved from Ford. Mertz joined Koehring in 1953 as controller, transferring from Ford Motor Co. He was elected president in 1967 and chairman last year, when David W. Marchant, a Koehring executive, became president on an interim basis.

Lindgren, former executive vice president of Mead Corp., Dayton, Ohio, was brought in as president and chief operating officer last July, when Marchant became vice chairman.

Lindgren, who also had been a Ford executive, was vice president in charge of the agricultural equipment group at Allis-Chalmers Corp. here before joining Mead.

March 28, 1975

The Wall Street Journal
711 West Monroe Street
Chicago, Illinois 60606

Re: Koehring Company Annual Meeting

Gentlemen:

Here's a copy of recent articles in the Milwaukee newspapers about the March 21st Koehring Company Annual Shareholders Meeting.

I was a bit surprised to see no reference of that meeting in your paper this past week.

The only inaccuracy I have detected in the newspaper articles is the reference to Mr. Williams as having nominated Messrs. Schwamborn and Shield. The fact is that they were nominated by Edwin B. Hill, a former director of Koehring Company. I believe it was Mr. Williams who seconded their nomination.

Some of the specific investments by the employee profit sharing fund which were questioned involved investments in Career Academy and National Tape at a time when both Mr. Mertz and J. Victor Loewi of Loewi, Inc. were on its investment committee. Investments were made at the same time that Mr. Loewi's company, Loewi, Inc., was very much involved in those two issues.

A more recent investment question involved a management decision that the Retirement Trust would purchase 100,000 shares of authorized but unissued shares from the treasury at a price of $1,600,000. The transaction occurred on January 25, 1974 and by the end of the year the market value of those shares had diminished to $350,000 with no dividends being paid on the shares. Mr. Mertz indicated that this transaction would very likely be reversed at the April meeting of the Investment Committee of the Trust. According to a March 11, 1975 letter from

the corporate secretary of Koehring, that investment committee consisted of O. R. Mertz, J. V. Loewi, F. M. Belmore and V. R. Peterson. Mr. Belmore is one of the present directors and Mr. Peterson is the Vice President-Finance.

I fully appreciate that you must apply your own judgment as to what is newsworthy and what is not. However, if you think that there is anything involved here which may be of interest to your readers, I would be glad to help you get such facts as might be accessible to myself or a client of ours. I had a court reporter in attendance at the Annual Meeting. However, no transcript has been prepared because a $300 estimate is a bit too large for my client's pocketbook.

Yours very truly,

W. A. Denny

WAD:plw

Enclosures

MEMO TO THE FILE(S)

RE: Koehring Proxy File

AND: Robert E. Williams File

BY: W. A. Denny April 2, 1975

April 1st I received a phone call from the reporter for the Wall Street Journal.

His name is Ames Smithers. His phone number is 312-648-7720. The address is 200 West Monroe Street, Chicago, 60606.

He expressed a keen interest in anything else that might develop with respect to Koehring Company that might be newsworthy. He asked for my promise to inform him as to anything that might be filed in Court regarding Mertz and Loewi and the Career Academy and National Tape shares.

I told him I would do all that I could.

WAD

Office
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2376

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORVILLE R. MERTZ and
McGRAW-HILL, INC.,

Petitioners,

v.

WILLIAM A. DENNY,

Respondent.

On Writ of Certiorari
to the Supreme Court of the
State of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Statement Involved In This Case Is Not Of The Type For Which The First Amendment Affords Constitutional Protection.

This case involves a feature story, developed by McGraw-Hill over a period of several weeks, about how Mertz was deposed as manager of a corporation.

Mertz, after learning that Denny was one of those interviewed for the story, called the reporter to raise question about Denny's credibility and reputation. In the course of that telephone conversation, he made a statement about Denny which the Wisconsin Supreme Court has found was not true. At page 663 of its decision, it said:

> We accordingly hold that Mertz's statement could have been understood by reasonable people in the community in a defamatory sense, and, insofar as it conveyed the impression that Denny[1] had been fired, was not true.

The infirmities of false statements of fact were recognized in Gertz v. Robert Welch, Inc., 418 U.S. at 340:

* * *

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public

---

[1] Reproduced in the Appendix to this brief are excerpts of the deposition testimony of Mertz and the McGraw-Hill reporter relating to the telephone conversation in which Mertz made the false statement about Denny.

issues. New York Times Co. v. Sullivan, 376 U.S., at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Later, it was said in the concurring opinion of Justice Paul in Cox Broadcasting Corp. v. Cohn, 420 U.S., at 499:

> In Gertz we held that the First Amendment prohibits the States from imposing strict liability for media publication of allegedly false statements that are claimed to defame a private individual. While providing the required 'breathing space' for First Amendment freedoms, the Gertz standard affords the States substantial latitude in compensating private individuals for wrongful injury to reputation. '(S)o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.' 418 U.S., at 347.
>
> * * *

The Wisconsin Supreme Court, after carefully considering Gertz and the decisions of this Court which followed it, and, after

finding that Mertz's statement to the reporter was not true, has remanded this case for trial. In its decision, it has directed that at trial determinations be made as to:

- whether the media defendant was negligent in broadcasting or publishing a defamatory statement (106 Wis. 2d at 658);
- whether Denny can prove actual malice so as to be entitled to punitive or presumed damages from McGraw-Hill (106 Wis.2d at 659);
- whether Mertz's statement was defamatory (106 Wis.2d at 662); and
- Mertz's liability, if any, according to the common law of defamation in Wisconsin (106 Wis.2d at 661).

II. Because The Wisconsin Supreme Court Has Remanded This Case For Trial, It's Decision Is Not Final "As An Effective Determination Of The Litigation." Therefore, For The Reasons Recently Stated By This Court In O'Dell v. Espinoza, The Petition Should Be Dismissed For Want Of Jurisdiction.

In John O'Dell, et al v. Andrew Espinoza, et al, 102 S.Ct. 1865, 72 L.Ed. 2d 237 (1982), this Court, in a per curiam

opinion, said:

> Under 28 U.S.C. sec. 1257, this Court has jurisdiction to review only '(f)inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation.' Market Street R.Co. v. Railroad Commission, 324 U.S. 548, 551. Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

The decision of the Wisconsin Supreme Court for which petitioners seek certiorari also is not final "as an effective determination of the litigation." The Wisconsin Supreme Court has remanded the case for trial. Depending upon what the jury finds on the issues of malice or reckless disregard of the truth, the verdict may even render moot the questions presented in the petition.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the writ of certiorari to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

WILLIAM A. DENNY
(Counsel of Record)

of

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250 East Wisconsin Ave.
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Attorneys for William A. Denny

EXCERPTS FROM DEPOSITION OF
ORVILLE R. MERTZ TAKEN ON
May 7, 1979

Page

3 Q. Mr. Mertz, would you please state your name and address for the record?
A. Orville Mertz, 4217 Buchanan, B-u-c-h-a-n-a-n, Road, Oconomowoc, 53066.

***

9 Q. Now, when was the first time that you heard Mr. Santry's name?
A. I think when he left a message for me to call him, probably early in December.
Q. But in any event, after December 5th?
A. Yes.
Q. When did you cease occupying your office at Koehring, the physical office, your desk, your chair, et cetera?
A. Some time in January, I would guess. Now, this is an approximation.
Q. Of course. Did Mr. Santry call you at the Koehring office, or did he call you at home the first time?
A. He called me at both places. He called me at the office and left

messages, and he called me at home and left messages. He called my wife at home and asked when I would be there. He tried to make an appointment to call me.

10 Q. And did you answer any of the messages?

A. No. As a matter of fact, when she said I would be home, I arranged to be gone; so I avoided talking to him.

Q. Did you know what subject matter he was calling you about?

A. I had heard that he was doing an article on Koehring -- this was part of the message that I had gotten -- in Business Week, and I just didn't want any part of communicating with him.

***

11 Q. And did you return his call, or did he eventually call you?

A. He caught me at home early in the morning, I was having breakfast, the telephone rang, and I answered it. And he said, "This is Mr. Santry of Business Week," and I said, "Yes." He said, "I'm writing a story about Koehring, and I've interviewed fourteen or fifteen different people, and I would like you to verify some facts for me."

11 Q. Did he say -- He must have mentioned the names, at least some?
A. Later on in our discussion he did mention some names, and that's the way he kind of trapped me into talking to him because at that point my concern was that he wanted me to verify some facts. Okay, I'll screen those and see what is fictional and what is fact.

***

62 Q. Now, on the same day you called Mr. Santry back, did you not?
A. Very quickly thereafter. I thought to myself and said to my wife, you know, there are so many things that are alleged that are biased here, and there is a one-sided viewpoint. So many things have been alleged by Bill Denny, I wondered whether Santry really got a view of Denny's relationship with Koehring Company through which to filter his comments.

***

63 Q. When you say you wanted him to screen that information in view of Mr. Denny's work at Koehring Corporation, what did you think Mr. Denny's work at Koehring had to do with screening his comments?

63 A. Mr. Santry could answer that, and he did, and he said the views of former employees are always suspect.

***

65 Q. You can, of course, refresh your recollection from the notes. Do you think that Mr. Denny was telling some untruths about you?

A. Mr. Denny used innuendoes and allegations and raised questions that would imply things that actually were not true.

Q. This is what you believed?

A. This is what I believed and what I think is factual. He sought out information that would raise questions in the minds of people about the integrity of the management and me particularly or the capacity of us to manage correctly. There were many, many allegations or implications or questions raised that would, by raising the question, create a doubt.

Q. Did Mr. Denny raise questions about your integrity or about your ability?

A. I judged it to be both but more perhaps performance than integrity or

65 ability.

Q. And after you hung up the phone at the end of the first forty-five minute conversation with Mr. Santry, you had second thoughts saying Santry might be paying too much attention to Denny?

66 A. And to all the dissidents. I felt like I was the only one of the non-dissidents he had talked to. That was the feeling he created in me. I'm sure that was wrong, but that's the feeling I got.

Q. Yes.

A. I think he's an expert interviewer, and that's why I got that feeling, you see. I think he's a pro.

***

71 Q. You called him back and said in sum and substance, Mr. Santry, before you pay attention to -- there must be a better word than that -- before you give credibility to Mr. Denny's statements, why don't you check out his reputation, correct?

A. Okay.

Q. And at that time you believed, did you not, that in checking out Mr. Denny's reputation Mr. Santry might

71 not pay as much attention to Mr. Denny's statements than he might have without doing so; isn't that a fact?

A. I would accept that.

Q. And then at the same time you discussed your personal relationship with Mr. Denny, which involved Mr. Denny leaving Koehring?

72 A. Correct.

Q. And from your conversations -- excuse me -- and in your conversations, you conveyed to Mr. Santry that Denny's termination at Koehring had been under adverse circumstances, as you viewed them, did you not?

A. I said that we had circumscribed his work, that we had restricted his work, that I made it clear he wouldn't be a vice president and general counsel, that his services were really terminated, with all this background.

***

Q. Did you tell Mr. Santry Mr. Denny had resigned?

A. No.

***

80 Q. Going to the resignation, the time period between when Mr. Denny, according to you, came in and said he wanted to leave and the time when he actually

resigned, was about four months or so?

A. Probably four or five months.

Q. And during that time, you and Mr. Denny were on friendly terms?

A. Oh, sure.

***

EXCERPTS FROM DEPOSITION OF
DAVID G. SANTRY TAKEN ON
JUNE 28 and 29, 1979

Page

3 Q. Please state your name and address for the record.

A. David G. Santry, 35 West 64th Street, New York City 10023.

***

4 Q. What is your job title at Business Week? Reporter?

A. When I was hired I was assistant management editor.

Q. Maybe you can run through your career in Business Week.

A. Assistant management editor for six months. Then I was made a contributing editor in May of '74.

Then the title contributing editor was changed to staff editor. Essentially the same thing.

5 And I stayed in that job until July of '77 when I was made editor of the Inside Wall Street Department, and I write a weekly column on Wall Street now.

Q. From December of '75 through the Spring of '76, you were the contribu-

5 ting editor, correct?

A. Correct.

Q. What were your assignments, your tasks? Describe your job.

A. Writing, reporting and editing stories for the management department.

Q. Didn't you have your own byline?

A. No, it's group journalism.

Q. How many assignments do you have per week, let's say?

Do you work upon ten projects? Five projects?

A. No, I try to have some ideas and be working on them here and there. But I -- usually one story would be working on, you know, that would go into the magazine.

I worked for another fellow at this point.

***

6 Q. Maybe you can start with, when was the first time that you ever learned about the situation at Koehring that eventually led to Mr. Mertz's departure?

A. On December 5, 1975 I read a Dow Jones -- an item on the Dow Jones tape, that Mertz had resigned and he said he did it to end the turmoil at Koehring.

***

6 Q. And so you saw the Dow Jones tape. What made you investigate it further, in pursuing this story?

A. Mertz's statement.

Q. Was that of general interest to the business community as far as you were concerned?

A. Yes.

***

8 Q. Going through the chronology, there is a suggestion made to call on somebody named Robert Baird.

And you did that, did you not?

A. Yes.

Q. Who did you call and what time?

A. I believe the fellow's name is Crandall Hayes, and Mr. Hayes suggested I call William Denny.

***

9 Q. Did you call Mr. Denny?

A. Yes.

Q. Do you recall on what date?

A. No. It was soon after the Fifth.

Q. What is your best recollection of your conversation with Mr. Denny?

10 A. I think he said: I'll send you some newspaper clips, and I think he filed suit against Koehring.

10 And he was going to send me the papers on the suits and a bunch of letters he had written to directors and so forth, trying to get minutes of directors' meetings.

***

28 Q. Mr. Santry, could you explain what happens at Business Week? How does the story end up from the document which is marked as Exhibits 4-1 to the final story, which is Exhibit 1?

A. All right. I write the story, and I submit it to Burgen, who is the management editor.

Then he would read it, and if he had any questions we would go over it, and he might do some editing.

Then from him it went to Gordon Williams, the first reader here. He's a senior editor, and he also reads it and does some editing.

Q. In this case did Mr. Burgen suggest some changes or some verification of facts or some more work on your part?

A. Yes.

Q. What did he ask you to do?

A. I think he regrote the lead. As a matter of fact, in this draft -- can I go off the record a minute?

***

29 Q. Did Mr. Burgen ask you to verify any facts in your story?
A. I can't recall.
Q. Did Mr. Williams ask you to verify any facts --
A. I can't recall.

***

43 Q. Was your last interview with any of your sources December 30th of 1975?
A. Yes.

***

Q. Were you done with your fact gathering now on December 30th of '75?
A. Yes.
Q. Was there some deadline set on your story as to when it had to be in final form?
A. I can't remember when it was scheduled for.

***

52 Q. What was the basis for your statement in Exhibit 1, the article, that Mr. Denny had been fired in 1969?
A. The conversation that I had with Orville Mertz.
Q. Could you give me your best recollection, you may refresh your recollection with your notes, if you want, Exhibit 3, as to what you believe Mr.

52 Mertz told you, and what questions you posed to him.

53 A. Mr. Mertz proferred the information. We had one interview.

I called him. I finally got a hold of him after trying innumerable times, and I finally got hold of him the morning of December 30th.

I asked him a lot of questions about his tenure and so forth, and that interview concluded.

He called me back later that day; specifically to say that I should weigh carefully anything Denny said about him, and he said that he had terminated Denny in 1969.

He gave some reasons; that Denny was litigious, he lacked judgment, he never settled any cases, he cost them money, and he was a disaster to have around.

Q. Mr. Mertz to the best of your recollection, he used the word "fired" or "terminated" or don't you recall?

A. "We terminated him."

***

57 Q. During either conversation, did Mertz also describe Mr. Denny's role

57 in Mr. Mertz's ouster?
A. Yes.
Q. What did he say in respect to Mr. Denny about that?
A. May I refer to my notes?
Q. Please do. I wish that you would refer to them as much as you think that you have to.
A. He refers to Denny as the spearhead of this -- of the campaign to oust him. He said that Denny was personally highly active in this campaign.
Q. I thought that you were referring to your notes?
A. Yes.
Q. From the conversation with Mr. Mertz, did he agree that there was some cause of the complaints brought by the dissidents?
A. Mertz was a very clever --
MR. HAMMOND: Objection, it's not responsive and it's a characterization.
Q. I would like to know what was your impression of the conversation.
MR. HAMMOND. I still object.
58 The question was: What did he say? And that is what is should be limited to.
A. Mertz had explanations for all of

58 screw-ups during his tenure.

MR. HAMMOND: Same objection, and I move that that be stricken.

***

59 Q. Mr. Santry, what was your reason for using the word "fired" in your article which is Exhibit 1, as compared to "terminate"?

A. It's a good, strong, active verb.

Q. It's a good, strong, active verb as compared to terminate, which is a less sort --

A. That is a corporate euphemism, and as a writer I want strong, taut prose.

60 Q. Mr. Santry, your last conversation with any of the interviews, is the second conversation with Mr. Mertz; is that correct?

A. I believe so.

Q. Did any of your editors question whether or not the word "fired" should be used in that article?

A. No.

Q. Did you try to verify that fact with anybody else after the second conversation with Mr. Mertz?

A. No.

***

60 Q. Did you try to verify after your second conversation with Mr. Mertz whether or not Mr. Denny, in fact, had been fired?

A. No.

***

62 Q. Did Mr. Mertz himself state anything about Mr. Denny's reputation?

A. He said something to the effect that he was not held in the highest regard amongst members of the Milwaukee bar.

Q. Did you ask him the question as to Mr. Denny's reputation, or how did that statement come about?

A. This was all proffered by him in the second telephone conversation.

Q. The second telephone conversation was initiated by Mr. Mertz; is that correct?

A. Correct.

Q. Did he state what was the reason for him calling you?

63 A. As I said before, he wanted me to know that I should weigh carefully what Denny had said about him.

Q. Did you have any reason to disbelieve any of the facts that Mr. Denny had told you?

A. No.

63 Is that the reason why you did not check his reputation as suggested by Mr. Mertz?

A. Yes.

Q. Had any of the people whom you had called, and that would include Hill, Miller and Harsh, had any of them said that Mr. Denny had been fired?

MR. HAMMOND: I am going to object to the question on the same basis as I previouslv did. The witness may answer.

MR. RITERIS: Will his answer include Hill, Miller and Harsh?

MR. HAMMOND: Read the question back to me, please.

(Question read)

A. No.

Q. Or terminated?

A. No.

****